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APPENDICES

THE LAW OF ACCESS TO THE MEDIA

A. THE PRESS

1. THE CONSTITUTIONAL POSITION OF FREEDOM OF THE PRESS IN CANADA.

Freedom of the press, while fundamental, is a qualified, not an absolute right. Lord Coleridge said of it:

"A man may lawfully express his opinions on any public matter, however distasteful, however repugnant to others, if, of course, he avoids defamatory matter, or if he avoids anything that can be characterized either as blasphemous or as an obscene libel." [Rex v. Aldred (1909) 22 Cox C.C. 1,4]

More recently this limitation was expressed by (then) Chief Justice Renfret in the Supreme Court of Canada:

"To interpret freedom as licence is a dangerous fallacy." [Boucher v. The King (1951) S.C.R. 265]

What, then, is the legitimate extent of this freedom, as determined by the constitution and laws of Canada?

Perhaps the best point to begin an examination of freedom of the press is where the most important attempts are made to curtail it in the political arena. Speaking to an audience largely composed of journalists, Richard Crossman, the English Labour M.P. and Sunday Mirror columnist said about the news reporter:

"He plays politics, and it is absolutely futile for the press to say 'Look, we just report the news.' They do not just report the news, they make and unmake politicians, and the politicians know it." [Proceedings of the 33rd Couchiching Conference, Canadian Institute of Public Affairs, University of Toronto Press, 1965, p. 113.]

To ensure the longevity of the freedom, the Constitution of the United States is explicit. The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech or of the press, . . ." And this right has been jealously guarded by American Courts. The measure of that development will be presented in a later section of this manuscript.

In the United Kingdom there is no written constitution, hence no entrenched prohibition against legislating away this freedom, although in practice it might be unthinkable. Further, the British constitutional doctrine of Parliamentary Sovereignty holds that Parliament is supreme--and therefore, can pass laws about any matter it chooses, without submission to judicial or other review (except for the formality of Royal assent).

In spite of the existence of a Canadian Bill of Rights (discussed below) roughly approximating, in some of its sections, the U.S. First Amendment, the British North America Act, the Canadian Constitution is ". . . similar in principle to that of the United Kingdom." [Preamble, The British North America Act, 1867, 30 and 31 Victoria, C. 3]

Therefore the Supremacy of Parliament is the central doctrine of our constitution as well, the only question being whether the power to legislate over a particular matter falls within the ambit of the Dominion or Provincial powers, as defined by S. 91 and 92 of the B.N.A. Act. Between the two types of legislature, all powers are distributed (the "exhaustiveness" doctrine). Thus the Supreme Court of Canada may find a particular provision of an Act ultra vires of a



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Provincial parliament, but it could not hold the same to be ultra vires of the Dominion Parliament, and vice versa.

In relation to freedom of the press, the Supreme Court of Canada has held that this may be curtailed by the Dominion parliament (exclusively) as a branch of its criminal law power (per S. 91(27) of the B.N.A. Act). Mr. Justice Cannon stated in the famous Alberta Press Bill case:

"The federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press . . . These subjects were matters of criminal law before Confederation, have been recognized by Parliament as criminal matters and have been expressly dealt with, by the criminal code. No province has the power to reduce in that province the political rights of its citizens as compared with those enjoyed by citizens of other provinces in Canada." [(1938) S.C.R. 100 at 146]

If one is seriously concerned about the maintenance of this freedom, of course it is of little consolation that only the federal parliament can restrict it. However there is some suggestion (as noted by Professor Schmeiser in two recent decisions that the Courts are beginning to articulate the principle that certain fundamental freedoms ought to be beyond the scope of both Federal and Provincial legislatures, [D.A. Schmeiser, Civil Liberties in Canada, Oxford, 1964, p. 71 - 87]

The Quebec Court of Appeal in Chabot v. School Commissioners of Lamorandiere held that natural rights cannot be taken away by positive law. [(1957) 12 D.L.R. (2d) 796, (1957) One Q.B.707]. Also, by analogy, Mr. Justice Abbott of the Quebec "padlock law" case that neither Parliament nor the provinces may curtail the right to discussion and debate. [Switzman v. Elbling and A.G. Quebec, (1957) S.C.R. 285, 117 C.C.C. 129, 7 D.L.R. (2d) 337]. On the other hand, in

in another recent decision (concerning religious freedom, but applying by analogy to Abbott J.'s dictum in Switzman), Kerwin, Fauteux and Cartwright J.J. specifically disagreed with the view that religious freedom could not be abrogated by either federal or provincial parliaments. [Saumur v. Quebec, (1953) 4 D.L.R. 641, at p. 664 and 671.]

The earliest federal legislation attempting to define the boundaries of freedom of speech is the Criminal Code, [S.C. 1953-54, 2-3 Elizabeth II C. 51 as amended.] Section 246 prohibits "blasphemous libel," while Sections 247-267 cover "defamatory libel," setting punishment and permitted defences, for newspapers, magazines, books, reports, etc. The maximum penalty for publishing a defamatory libel "likely to injure the reputation of any person . . ." is imprisonment for five years, knowing the libel to be false, or two years otherwise. Additionally, Section 8 allows judges and magistrates to commit for contempt of court an offence described in the press context by Lord Russell of Killowen, C.J., in these terms:

"Any act done or writing published calculated to bring a Court or judge of the Court into contempt or to lower his authority is a contempt of court . . . Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court." [Regina v. Gray (1900) 2 Q.B. 36, at p. 40].

This punishment is intended to deter the discussion of cases sub judice as "A litigant or accused person is entitled to present his case to a tribunal which has not been exposed to a barrage of ex parte statements relating to the subject matter of the cause before it." [In Re Sommers and Sturdy (1956), 19 W.W.R. 583 at p. 594]. The punishment is also

designed to discourage scurrilous attacks on specific judges.

The power to commit for contempt being largely discretionary it should be carefully watched and exercised only with moderation. [(1957), 17 CCC 121].

Then in⁸ 1960, the Canadian Bill of Rights was passed by Parliament. It provides:

S. 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

• • •

f. freedom of the press

S. 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared . . .
[S.C. 1960, C. 44]

The Bill of Rights is not a part of the Canadian Constitution, but merely an Act of Parliament, subject to amendment or repeal by a future Parliament. This denies the Bill the moral and legal force enjoyed by its U.S. counterpart, which stands as the supreme law of the land, and indeed Canadian courts have interpreted it narrowly or have been unwilling to apply it to striking down federal legislation. As Parliament may expressly declare a statute to be exempt from its

provisions (per S. 2), and as the Bill does not apply to provincial statutes (from which most "freedom of the press cases" have arisen), in practice it provides very little protection.

2. FREEDOM OF THE PRESS IN PRACTICE

Turning now from the constitutional and legal framework to freedom of the press in practice, it is immediately apparent that the greatest threats to freedom of the press have come not from the federal parliament. Rather, the threat has come from the provinces, especially Alberta, Quebec and British Columbia. The provinces (or their creations, the municipalities) have found several methods of dealing with publications offending the provincial sense of public decency, threatening the political party in power, or dissenting in some manner offensive to local fastidiousness.

One can describe at least six methods of modifying freedom of the press, that have been or may be used by some branch of governments in Canada.

a. Direct Censorship

The most dramatic example of direct interference was the Alberta Social Credit Bill passed ". . . to ensure the Publication of Accurate News and Information." The Bill stipulated that every newspaper must, when so requested, provide equal space and prominence to articles supplied by the Provincial Government for the "correction or amplification" of any statements published by that newspaper relating to activities or policies of the Government. A second provision would have forced newspapers to divulge their sources of

information when required to do so. The penalties envisioned would include the prohibition, by Order in Council, of the publication of that newspaper (or of any information from any person or source specified in the order), either for a definite time or until further order, (i.e. indefinitely).

The Supreme Court of Canada held the Bill to be beyond the powers of the provincial legislature (as being in relation to criminal law, a federal power exclusively), and in an often-quoted judgement, Mr. Justice Cannon delivered a scathing attack on the Bill:

"Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion is essential to enlighten public opinion in a democratic state; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest." [(1938) S.C.R. 100 at p. 146. Cited with approval by three of the five majority judges in *Saumur* (1953) 2 S.C. R. 299]

Following the Alberta Press Bill case government in Canada has abstained from any attempt at direct censorship of the press.

b. Interference with Distribution

Rather than attempting to control what goes into a publication, as in Alberta, the Union Nationale Government in Quebec attempted, in more subtle ways, to prevent altogether the distribution of the offending publications.

In the landmark Saumur case, in a very complicated and confusing judgment, in which only the conclusion of the Court was evident, a

majority of the Supreme Court of Canada held ultra vires a Quebec City bylaw intended to prevent the Jehovah's Witness sect from distribution "in the streets of the city of any book, pamphlet . . . without having previously obtained . . . the written permission of the Chief of Police." [(1953) 2 S.C.R. 299]

In the 1957 Switzman case the Supreme Court ruled ultra vires the Quebec "padlock law" which attempted to permit the police to padlock the house of any person who used the premises "to propagote communism or bolshevism by any means whatsoever." [(1952) S.C.R. 285]

c. The Exercise of Discretion in Licensing

Quebec sought to regulate freedom of the press with its padlock law by means of a 'property' subterfuge (so as to bring it within Section 92(13) of the B.N.A. Act, and, therefore, provincial jurisdiction), by basing it on possession of a house. It failed.

British Columbia, however, has successfully used provincial powers [The Vancouver Charter, Stat. B.C. 1953, C. 55] to revoke the publishers licence of a Vancouver newspaper, the Georgia Straight, although this case only went as far as the B.C. Supreme Court [Hlookoff et al v. City of Vancouver et al., 67 D.L.R. (2d) 119] and was not heard by the Supreme Court of Canada. The Georgia Straight, described by its opponents as a "filthy rag," had a circulation of about 60,000, sold largely to high school students through street vendors. The Chief License Inspector, on the "recommendation" of the mayor, exercised his power under The Vancouver

Charter authorizing him, per S. 277,

" . . . at any time summarily to suspend for such period as he may determine any license if the holder of the license . . .

c. Has, in the opinion of the Inspector, been guilty of such gross misconduct in or with respect to the licensed premises as to warrant the suspension of his license." [Stats. B.C. 1953, c. 55]

In spite of the arbitrariness that could be read into the term "gross misconduct," Mr. Justice Verchere rejected the argument of the plaintiff newspaper that Section 277(c) was unconstitutional as it had the effect of regulating newspapers, holding that section 277(c) was "in pith and substance" regulation by the city of its licencees, and thus came within S. 92(13) of the B.N.A. Act, "property and civil rights within the province." He emphasized that:

"It is in no way directed to the suppression of free speech or of its ancillary right, freedom of the press. It is conceivable of course that in some circumstances the operation of the section could limit the publication or distribution of a newspaper . . . But such an effect would be incidental to the object of the legislation . . ." [Hlookoff et al v. City of Vancouver et al, 67 D.L.R. (2d) 119]

Now, should any Vancouver newspaper embarrass the mayor to such an extent that the Chief License inspector desires to characterize the behaviour as "gross misconduct," it might be censored or threatened with license revocation, with the Georgia Straight as a precedent. This is a clear denial of freedom of the press, at present unremedied.

d. Contempt of Court

For several days in the Spring of 1969, students occupied buildings at the University of New Brunswick. The University sought

an injunction barring a professor from the campus. Student newspaper columnist Tom Murphy was a witness at the trial. He described the trial in his column as a "mockery of justice," accusing the N.B. Courts of being "tools of the corporate elite." This intemperate but rather commonplace statement by some concerning the courts led to a conviction for contempt of court and a sentence of 10 days in jail. The Court rejected the arguments (for the accused) of the Canadian Civil Liberties Association Counsel, that the concept of "scandalizing" contempts of court was obsolete in Canada (the last N.B. case having been in 1889) or alternatively, that conviction requires an intent to interfere with the administration of justice or an imminent peril to the administration of justice. The judge held that in his opinion the accused exceeded the limit "to what a person may say or write of a judge or court." [Regina v. Murphy, 1969, 4 D.L.R. (3d) 289]

e. Zoning

In a recent 5-4 decision, the Supreme Court of Canada held the bylaw of the Township of Etobicoke prohibiting the posting of election signs on houses or lawns. [McKay et al. v. The Queen, (1965) S.C.R. 798, 53 D.L.R. (2d) 532] The Court quashed the conviction of the federal N.D.P. Candidate, David Middleton, on whose own lawn his sign had been situated. The rather unsatisfying basis of the decision was not that this infringed a fundamental freedom, but rather that, elections being a federal matter, such activities could be prohibited only by Parliament, which had "occupied the field" in enacting the

Canada Election Act governing signs and posters, etc. during elections.

Thus other zoning bylaws could be created or used to hamper freedom of the press, if not overlapping with a field already occupied by federal law.

f. Taxation

Subtle taxation measures aimed at hurting newspapers in general, or at particular papers, could easily be passed by provincial legislatures, although no cases have been found to date. Provincial taxes on a particular method of distribution of great importance to one newspaper but not another, minimum wage regulation, e.g. requiring double pay for night-time workers in certain industries including newspapers, etc. could be used. The methods of censorship are really only limited by the imagination of the censor and the vigilance of our courts and legislators.

2. THE UNITED STATES: CONSTITUTIONAL RIGHT OF ACCESS

(a) A Brief Statement of Professor Barron's Position

The constitutional base exists in the United States for Congress to command the right of citizen access to the media. Indeed, the First Amendment to the Constitution has been read as favouring such legislation. By its terms the amendment, inter alia, prohibits government from enacting any law which would strike at freedom of speech or the press. In a scholarly article Professor Jerome A. Barron concluded [Barron, Access To The Press--A New First Amendment Right, 80 Harvard Law Review 1641, 1676 (1967)]: "I do not think it adventurous to suggest that, if Congress were to pass a federal right of access statute, a sympathetic court would not lack the constitutional text necessary to validate the statute. If the first amendment is read to state affirmative goals, Congress is empowered to realize them. My basic premise in these suggestions is that a provision preventing government from silencing or dominating opinion should not be confused with an absence of governmental power to require that opinion be voiced.

"If public order and an informed citizenry are, as the Supreme Court has repeatedly said, the goals of the first amendment, these goals would appear to comport well with state attempts to implement a right of access under the rubric of its traditional police power. If a right of access is not constitutionally proscribed, it would seem well within the powers reserved to the states by the tenth amendment of the Constitution to enact such legislation. Of

course, if there were conflict between federal and state legislation, the federal legislation would control. Yet, the whole concept of a right of access is so embryonic that it can scarcely be argued that congressional silence preempts the field.

"The right of access might be an appropriate area for experimental, innovative legislation. The right to access problems of a small state dominated by a single city with a monopoly press will vary, for example, from those of a populous state with many cities nourished by many competing media. These differences may be more accurately reflected by state autonomy in the area, resulting in a cultural federalism such as that envisaged by Justice Harlan in the obscenity cases." [Ginzburg v. United States, 383 U.S. 463, 493 (1966) (dissenting opinion); Roth v. United States, 354 U.S. 476, 503-07 (1957) (dissenting opinion)].

The rationale for the legislation proposed by Professor Barron rests in the First Amendment itself. As he well states too little attention has been paid to the goals behind the constitutional provision. First, and most important in a democracy is the affirmative need for free expression so that the citizenry will be active participants in government, rather than inert. Professor Barron cited Mr. Justice Murphy in Thornhill v. Alabama [310 U.S. 80, 102, at 80 Harvard Law Review 1648]:

The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . . Freedom of discussion, if it would fulfill

its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Next, Professor Barron cites what he terms "the public order function" of the First Amendment. That is, the affirmative right of expression, if exercised, will operate to discourage more violent forms of expression such as riots that rip at the fabric of society. Mr. Justice Brandeis brought the point clearly to the fore in Whitney v. California [274 U.S. 357, 375 (1927)]: "[It] is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies. . ." For Professor Barron the "sit-in" demonstrates that the safety valve value of free expression in preserving public order is lost when access to the communication media is foreclosed to dissident groups." It is a measure of the jaded and warped standards of the media that ideas which normally would never be granted a forum are given serious network coverage if they become sufficiently enmeshed in mass demonstration or riot and violence. Ideas are denied admission into media until they are first disseminated in a way that challenges and disrupts the social order. They then may be discussed and given notice. But is it not the assumption of a constitutional guarantee of freedom of expression that the process ought to work just the other way--that the idea be given currency first so that its proponents will not conclude that unrest and

violence alone will suffice to capture public attention? Contemporary constitutional theory has been indifferent to this task of channeling the novel and the heretical into the mass communications media, perhaps because the problem is indeed a recent one." [80 Harvard Law Review, at 1650].

Fundamental to Professor Barron's approach is the need on the part of the people for access. "The British M.P. and publicist, R.H.S. Crossman, has observed that the modern world is witnessing at present a Political Revolution as searing and as consequential as the Industrial Revolution, a revolution which "has concentrated coercive power and thought control in a few hands." Power, he contends, has shifted from those who control the "means of production" to "those who control the media of mass communication and the means to destruction (propaganda and the armed forces)." Mr. Crossman, to be sure, writes from the vantage point of the British Labor Party, but his observations have the ring of urgency and contemporaneity. Difficulties in securing access, unknown both to the draftsmen of the first amendment and to the early proponents of its "marketplace" interpretation, have been wrought by the changing technology of mass media." [Id. at 1644.]

(b) The Supreme Court and The Right of Access--"The Red Lion" Case

Broadcasting, unlike the press, may afford an example of a medium which has inherent limitations in terms of the number of frequencies available for use. Not everyone, even if they possessed the necessary financial resources, could enter the business. Indeed,

it was the felt need to allocate this precious national resource that is the cornerstone of regulation by the Federal government through an independent agency. And, long before Professor Barron wrote, that agency, as it was then constituted, acted to insure fairness. The history of agency behaviour and its status under the law were stated and developed in Red Lion Broadcasting Company v.

The Federal Communications Commission [89 S. Ct. 1794 (June 9, 1969), hereafter referred to as Red Lion; see also, discussion under I, B-8, infra.]:

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."

Very shortly thereafter the Commission expressed the view that the "public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all discussions of issues of importance to the public!'" . . . This doctrine was applied through denial of license renewals or construction permits, both by the FRC, Trinity Methodist Church, South v. FRC, 61 App.D.C. 311, 62 F.2d 850 (1932), cert. denied, 288 U.S. 599, 53 S.Ct. 317, 77 L.Ed. 975 (1933), and its successor FCC, Young People's Association for the Propagation of the Gospel, 6 F.C.C. 178 (1938). After an extended period during which the licensee was obliged not only to cover and to cover fairly the views of others, but also to refrain from expressing his own personal views, Mayflower Broadcasting Corp., 8 F.C.C. 333 (1941), the latter limitation on the licensee was

abandoned and the doctrine developed into its present form. [Id., at 1799-1800]

The duty imposed by the FCC on licensees was affirmative in character. This must be stressed. It was not enough for a broadcaster to afford time for an individual to reply if attacked. There was a dual responsibility on the part of the broadcaster to be accurate, and to cover public issues. It was no excuse for a broadcaster to argue that sponsors were unavailable. The obligation then was to carry the matter at the broadcaster's expense. [Id., at 1800] The FCC's concern, in sum, was general and particular. There were the general requirements of fairness: Broadcasters were obligated to be accurate and to seek out public issues. There were the requirements flowing from the exercise of these duties. Quite obviously, if broadcasters accepted fully their general mandate the result would, from time to time, culminate in individual attack. So it was that the right of individual reply was commanded. And, that reply was not to be one either interpreted or read by the station, but by the individual attacked. [Ibid.]

The personal attack rules formulated by the FCC are quite precise. Because they may be of some comparative interest to the Committee they are included in full. [See also, discussion under I, B]:

"Personal attacks; political editorials.

"(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee

shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

"(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

"NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See Section 315(a) of the Act, 47 U.S.C. § 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

"(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: Provided, however, That where such editorials are broadcast within 72 hours prior to

the day of the election, the licensee shall comply with the provisions of this subsection sufficiently in advance of the broadcast to enable the candidate or candidates to have reasonable opportunity to prepare a response and to present it in a timely fashion." 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical).

Agency rules, however, cannot simply be validated through enactment. They must have a base of authorization in statute. For the FCC, the fairness and personal attack rules had an extremely broad base of statutory support. The Congress required the "Commission from time to time, as public convenience, interest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter . . ." [47 U.S.C. §§ 303, 303(a)]. Further, the Commission must consider the demands of the public in granting licenses. [47 U.S.C. §§ 307(a), 309(a)]. And, as with most licensees, including Red Lion, a condition of license itself is that the broadcaster operate in the public interest.

Thus, a central question before the Court was whether the fairness and personal attack rules reflected the public interest. It might have been a closer matter if the Court had only past agency action as a basis for guidance; it had, however, something far more significant. The Congress had declared public policy quite specifically:

In 1959 the Congress amended the statutory requirement of § 315 that equal time be accorded each political candidate to except certain appearances on news programs, but added that this constituted no exception "from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity

for the discussion of conflicting views on issues of public importance." Act of September 14, 1959, §1, 73 Stat. 557, amending 47 U.S.C. § 315(a) (emphasis added). This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation enacted into law and declaring the intent of an earlier statute is entitled to great weight in statutory construction. [Id., at 1801]

Grant that the Congress incorporated into statute the agency's policy relating to fairness and personal attack. Red Lion's challenge was more basic: Didn't the Constitutional guarantee of free speech afford the broadcaster the right to speak or not any way he saw fit? Didn't the fairness and personal attack rules not only force a broadcaster to speak in a given way on given items (accuracy and the need to cover issues of public interest), but also open the station to the voices of others? The Court answered the questions squarely; it did not attempt to evade: The airwaves belong to the public, not individual broadcasters. The Court stated:

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communication."

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475, 60 S.Ct. 693, 697, 84 L.Ed. 869 (1940); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-362, 75 S.Ct. 855, 857-858, 99 L.Ed. 1147 (1955); *Z. Chafee, Government and Mass Communications* 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be the Government itself or a private licensee. *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964); *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964). See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv.L.Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC. [*Id.*, at 1806-07]

The FCC's rules were upheld not in the context of a general reference to the Court, but measured against a specific fact situation. Because the set of facts in some way is similar to the kind that marked the earlier history of Canadian broadcasting, it is restated here. [See discussion under I-B, *infra*.] Red Lion is licensed to operate WGCB, a Pennsylvania radio station. On November 27, 1964 the station carried a 15 minute broadcast by Rev. Billy James Hargis under

the program format, "Christian Crusade." Hargis discussed a book by Fred J. Cook, "Goldwater-Extremist on The Right." In his discussion Hargis charged that Cook "had been fired for fabricating false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a 'book to smear and destroy Barry Goldwater.'" [Id. at 1796-97].

Cook, hearing of the broadcast, asked for and was denied reply time. Correspondence in the nature of an appeal to the FCC took place. The Commission declared that the Hargis broadcast constituted a personal attack; "that Red Lion had failed to meet its obligation under the fairness doctrine as expressed in Times-- Mirror Broadcasting Co., 24 P. & F. Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it."

(c) The Import of "Red Lion" for The FCC and The Press:
An FCC Commissioner's View

Not a great deal of time has passed since the Court handed down Red Lion. One FCC Commissioner, Kenneth A. Cox, speaking for himself, appeared on Aug. 11, 1969 before the Section of Individual Rights and Responsibilities, American Bar Association, in Dallas, Texas. There Commissioner Cox attempted to draw together Professor Barron's argument of access, the Court's ruling in Red Lion, and his

own views as a Commissioner. Rather than embellish the Commissioner's statement, it is set out in pertinent part. It begins after quoting the Court's view of the First Amendment. [Mimeo. at pp. 8 - 12]:

"Well, there's that concept of the "marketplace of ideas" which Professor Barron doesn't like, but this time the Court is doing something about it. And it goes on to knock down other arguments advanced by the broadcasters. Chief of these was the claim that our rules would inhibit coverage of controversial issues and force broadcasters into self-censorship. The Court answered that this is speculative, but that 'if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues.'"

"I think this is a truly remarkable declaration of the public's right of access to the broadcast media. There has been a good deal of interest over the last two years in this question of access. It seems to me a logical development from the great free speech decisions of the last 50 years, which dealt with questions of whether one could speak in a company town; or in the form of labor picketing; or on public property--whether it be a street, a park, or a school auditorium; or whether you can enhance your speech by use of a found track or exercise it under circumstances which may tend to a breach of the peace. In his later article in the March 1969 issue of The George Washington Law Review, Prof. Barron discusses more recent cases involving questions as to whether a jailhouse can be used as a forum for protest, whether Students for a Democratic Society can

advertise through anti-Viet Nam posters in New York City subway stations, whether one can distribute leaflets in the main concourse and passageways of the Port of New York Authority Terminal Building, and whether informational picketing can be carried on in a privately-owned shopping center. In all these cases the issue has been whether one can use a particular place or means for purposes of expressing one's opinions, and in Prof. Barron's latest cases he discerns a willingness on the part of judges to begin to talk of these matters in terms of access to the relevant audience toward which the speech is directed, and protect the right to speak against non-governmental interference. With the greatly increased importance of the broadcast media--and in view of their status as publicly licensed facilities--it is perhaps logical that the most unequivocal assertion of the public's right to employ privately owned media for the expression of the significant views of the community should have come in a broadcast case.

"What does the Red Lion case signify for the future? Certainly it hasn't answered all the questions that are involved in this very difficult field. Who is to exercise the public's right of access to radio and television? Both by statute and by necessity, broadcasters still cannot be treated as common carriers, so licensees will still have to make the initial decisions as to selection of the issues to be discussed and the spokesmen for the respective points of view. The FCC can be asked to review their judgments in appropriate cases, but will continue to give great weight to the good faith judgments of the broadcasters--though this does not mean we will

always ratify them. But broadcasters are not required to wait for contending groups to demand time. Rather, they should pursue an aggressive journalistic course of identifying the critical issues and themselves preparing programs which will provide means of public discussion and enlightenment.

"Does the case suggest that the broadcasters should be doing more than they have been--or that the Commission has responsibilities beyond those it has been exercising? I think the answer to both questions is yes. Despite the fine records of some broadcasters, I think it is clear that the industry generally has not done enough to harness its great capacities to the consideration and solution of the issues of the day. I do not suggest that the broadcasters should suddenly devote a major part of their time to documentaries and discussion, but it seems to me that a station with less than 1% of its time devoted to public affairs--typically, this would amount to from 1-1/4 to 1-1/2 hours per week--should carefully review its position. I think that the Commission should begin seriously to examine the records of stations as to these matters at renewal time. This will be a change in direction, because a majority of my colleagues have been regularly renewing the licenses of stations which have presented, and propose to present, little or nothing in this vital area. I think we should revise our application forms to enhance our ability to do this job, whether we get complaints from the public or not. I think the Supreme Court has construed the Communications Act as providing a right of public access which it is

incumbent on us to enforce in the interest of the public generally.

"Does Red Lion have implications for entertainment programming? Certainly, its main thrust is concerned with discussion of public affairs, which it quotes Justice Holmes as saying "is more than self-expression; it is the essence of self-government." But in the same paragraph the Court refers to "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences" (emphasis supplied). I suppose an entertainment program can be an "esthetic experience," though I'm not sure that's what Justice White had in mind. But in at least two other passages he refers--apparently approvingly--to Commission activity with respect to programming generally. And as Dick Jencks can tell you, there are some who contend that they should be allowed to express opinions on serious matters in the course of entertainment programs. I don't know whether Tommy Smothers has really established his credentials as spokesman for the young and disenchanted in these troubled times, but certainly this segment of our population is entitled to be heard--and a number of writers in this field have pointed out that the inability of the young and the blacks and the disadvantaged to get access to the mass media has led them to demonstrate and riot as substitute means of communication. I think what the Court has said has relevance to this problem.

"And, finally, does Red Lion speak for other media--unregulated media like newspapers and magazines? Certainly not directly, but if the First Amendment has as a prime objective, the

creation of "an informed public capable of conducting its own affairs," then certainly the Constitution guards the right of the public, as well as the publisher, in a free press. Whether this is yet the law, or ever will be in view of our long history of giving a highly preferred place to the press, I think it is good policy. It seems to me that the publisher even though he does not use the public's spectrum, owes the same moral duty as the broadcaster to use his medium to help fashion a better society. If this poses new problems for him--as some broadcasters think Red Lion does for them--then this must be accepted because with opportunity and power goes responsibility.. As a matter of logic and law it has long seemed to me that Congress could--if it wished--constitutionally apply counterparts of our equal time and right of reply obligations to most newspapers, since they move in, or clearly affect, interstate commerce and since the public interest in their providing their readerwith both sides of important questions is clear. Magazines may involve different issues because, as Prof. Barron points out, there is a difference between access to local audience and to the national one, since the former may be served by a single paper but the latter can usually be reached--at least theoretically--through a number of publications.

"I must hasten to add that most print publications--unhampered by the broadcaster's inability to present more than one program at once, during in inelastic time period--devote a higher percentage of space to public affairs than do most broadcasters. But, having

had no Fairness Doctrine, I think they may not do as well as many broadcasters in permitting direct public access to their pages.

In the Spring, 1969 issue of the Columbia Journalism Review, Ben Bagdikian rejects Prof. Barron's suggestion that the Courts should enforce a right of access to the press. Instead, he suggests:

- (a) "Start a new journalistic form: the occasional full page with a skilled journalist writing clearly and fairly six or seven ideas of the most thoughtful experts on solutions of specific public problems."
- (b) "Devote a full page a day to letters-to-the-editor, some days for random letters and others on a particular issue."
- (c) "Appoint a fulltime ombudsman on the paper or broadcasting station to track down complaints about the organization's judgment and performance."
- (d) "Organize a local press council of community representatives to sit down every month with the publisher."

I don't know how sound these ideas are, but they seem constructive to an outsider like myself. Certainly, I think publishers should give serious thought to admitting the public to their pages--and especially to recognizing a right of reply for those attacked in their publications, as is required in some other countries. I think this will enhance the standing of the press, and contribute to our ability to cope with public problems.

It seems to me that the Red Lion case has greatly advanced the proposition that our constitutionally protected mass media owe a constitutionally cognizable duty to permit the public to make more direct use of their newspapers and broadcast stations. While this may mean new problems for all of us, I think the potential benefits to our society are so great that further development along these lines should be encouraged."

5. THE PRESS: A SIMPLISTIC APPROACH TO ACCESS

(a) A Proposal

The regulatory process affords one approach to access. Agencies like the CRTC and the FCC have the statutory and constitutional authorization to develop, interpret, and enforce rules that define the broadcaster's responsibilities. The point is, however, that it is the broadcaster, a kind of intermediary, and the agency above him, that define the public's right to access. It is not the public which initially airs its views.

Quite outside the legislative ambit the press has evolved its own lines which with no affirmative legislation or regulation can insure the right of access to the public. A newspaper is divided into two parts: Editorial and Advertising. In its editorial capacity the paper speaks as an entity. In its advertising capacity the public as individuals may speak and assume responsibility for what they say.

Historically advertising has been used to sell goods or services. More recently advertising has been used to communicate individual views. Take, for example, the Esso advertisement printed in the Toronto Star on August 26, 1969. It speaks against newspaper reports, stories and editorials, that created "a completely false impression of the facts" concerning a government report on gasoline price-fixing in Sudbury. It is an advertisement against newspaper policy. It was written by Esso. It was given as much space, and printed in the size type that Esso felt was needed. No government agency demanded that the Star print a certain kind of story or give Esso equal space for reply. And, just as surely, none could doubt that it was speaking in the advertisement and not the paper.

Recent news reports from Sudbury seemed to create the impression that Imperial Oil (and other companies in the oil industry) had been accused of wrongdoing by fixing prices in that city several years ago.

This is just another example of the way words can give a completely false impression of the facts. The report of the Restrictive Trade Practices Commission, on which the news stories were based, did not state that any illegal act had been committed by Imperial. Nor did it imply that there had been a collusion between companies.

The Commission report arose from an investigation into the actions of some dealers in Sudbury who had agreed to raise their prices during a price war. Imperial, and other supplying oil companies, were not under investigation. However, in its report the Commission criticized an arrangement which Imperial (and other companies) had with its dealers. This arrangement helps to protect dealers from the worst effects of a price war. The company does not believe this criticism is justified.

Over the past 10 years, the oil industry has been hit with a number of price wars in various areas. It quickly became apparent that in these situations the company's dealers would

go under unless some way were found to help them. In response to this need Imperial came up with what is termed the consignment system.

Under consignment Imperial becomes the retailer and the dealer becomes the company's agent for the sale of gasoline. The company legally establishes the price at which gasoline will be sold at the station—and assumes all the risks of the price war. The dealer is paid a commission on each gallon sold, no matter how low the price to motorists may go. The commission paid is less than the margin he normally receives. That hurts. The return to the company is also reduced—usually the company takes a greater cut in what it receives per gallon than does the dealer. That hurts too. But price wars are a fact of life in the oil business and consignment is the best arrangement Imperial has been able to come up with to help the dealer to stay in business during a severe price war, and to maintain his and the company's sales volume.

To reiterate, Imperial has been charged with nothing. As a matter of fact, if we in Imperial weren't a little sensitive about reports that give the impression we're price fixers—and therefore crooks—we might manage a wry smile when we stop to think that we are getting less for Esso gasoline sold through service stations today than we did 20 years ago.

What Esso did others can do. There is nothing to prohibit individuals from pooling their funds to buy an advertisement. Should such monies not be available to individuals there are organizations reflecting varied views that may have such funds.

The role of government in keeping open the advertising door is clear; it is not vague; it requires no in depth regulations. The role of government is to establish the legal right of individuals to the advertising columns of the press. The role of government is to strike a newspaper's right to refuse to deal, to refuse to sell advertising space.

(b) The United States: Antitrust--Refusal To Deal

Through the years the storms have battered, but not destroyed the doctrine which permits an individual to deal with those of his own choosing. First uttered in United States v. Colgate & Co. [250 U.S. 300 (1919)], Mr. Justice McReynolds declared, "In the absence of any purpose to create or maintain a monopoly, the Act (Sherman Act) does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and of course, he may announce in advance the circumstances under which he will refuse to sell." [Id. at 307].

The prohibition imposed on the individual by section 2 of the Sherman Act is only that he not use his power to refuse to deal for purposes of creating or maintaining a monopoly. Thus, the court in United States v. Klearflax Linen Looms, Inc. stated: [63 F. Supp. 32 (D. Minn. 1945)].

The purpose of the Sherman Act is to establish a free market in any kind of goods in interstate commerce where competitors may have a free opportunity to compete. The attempt of Klearflax, therefore, . . . , to monopolize any part of such trade by refusing to sell, was wrongful. It is urged that Klearflax has a right to draw to itself any business which will enhance its own returns, but its acts were not directed to any legitimate business venture to enhance its own business, but rather was a designed attempt to monopolize the government business. . . . In other words, it was not a legitimate business practice to attain a lawful end. A refusal to sell, while it may be lawful per se, cannot be used in order to achieve an illegal result. (Emphasis added) [Id. at 39].

Similarly, an individual may not use his power of refusal to deal in order to extract an agreement which would be in violation of section 1 of the Sherman Act. [See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 15 (1955)]. This was made abundantly clear in the early case of FTC v. Beech-Nut Packing Co. [257 U.S. 441 (1922)]. Cf. Dr. Miles Co. v. John D. Parks & Sons Co., 220 U.S. 373 (1911)], and in the recent case of United States v. Park Davis & Co. [362 U.S. 29 (1960)]. See also United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); United States v. A Schrader's Son, Inc., 252 U.S. 85 (1920). The Park Davis case was discussed in 58 MICH. L. REV. 920 (1960) and 108 U. PA. L. REV. 1237 (1960)] where sellers entered into resale price maintenance agreements with their buyers, and enforced those agreements by refusing to sell to violators.

Vital, however, to violation of section 1 is a finding of an agreement. Professor Handler stated: "Section 1, which forbids contracts, combinations and conspiracies in restraint of trade, is incapable of violation by a single actor. It takes two to make a contract

or to enter into a combination or conspiracy. A refusal to deal, standing by itself, cannot constitute a contract, combination or conspiracy in restraint of trade." [Handler, Recent Antitrust Developments, 15 RECORD OF N.Y.C.B.A. 362, at 366 (1960). However, one may not dismiss recent appellate decisions which evidently have found a violation of section 1 without finding an agreement. See George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F.2d 787, 790 (2d Cir. 1960) where the court interpreted the Supreme Court's ruling in Parke Davis: "The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise. . . ." See also A.C. Becken Co. v. Gemex Corp., 272 F.2d 1 (7th Cir. 1959).]

Tested under either section 1 or 2 of the Sherman Act there can be no question of a medium's right to formulate standards for acceptability of advertising so long as they are reasonable and uniform. This rule has been recognized by the courts in framing decrees designed to eliminate monopolistic practices. In United States v. Lyman Gun Sight Corp. [TRADE REG. REP. (1957 Trade Cas.) § 68851 (D.D.C. NOV. 8, 1957)] the court ordered, inter alia:

Each publishing defendant is enjoined and restrained for a period of ten years from refusing to publish advertisements for scopes from any dealer . . . or other person advertising such scopes for sale, where the advertiser and the advertisements meet the reasonable standards uniformly applied by the defendant without regard to the fact that the advertiser offers scopes for sale at prices less than the manufacturer's list prices therefor. [Id. at 73451]

So, too, in United States v. General Outdoor Advertising Co. [TRADE REG. REP. (1955 Trade Cas.) § 68169 (N.D. Ill. OCT. 21, 1955).] the court grafted an exception on its decree enjoining defendant from refusing to sell advertising: ". . . provided, however, that nothing herein shall prevent defendant from refusing to sell advertising space based on bona fide compliance with reasonable requirements as to financial responsibility and business ethics." [Id. at 70819]

The failure, however, to evolve and implement uniform, reasonable standards could well bring a medium onto dangerous ground. The arbitrary, capricious administration of varying advertising standards may result in one advertiser obtaining a distinctive lead over another. If the medium shared in an agreement to create such a situation, it may be in violation of section 1 of the Sherman Act. And, it is worth noting that an agreement in restraint of trade need not be express; it may be implied. [Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939): "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." Accord, FTC v. Cement Institute, 333 U.S. 683 (1948); Eastern States Retail Lumber Dealers Assn. v. United States, 234 U.S. 600 (1914); cf. Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954) where conscious parallelism, alone, was not sufficient to find an agreement.]

There is another, more distant danger facing a medium which exercises its right to reject advertising in an arbitrary

manner. Those discriminated against would argue that the medium is clothed with a public interest and may not abuse its power.

They will recall the language of the Supreme Court in Munn v.

Illinois: [94 U.S. 113 (1876)]:

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. [Id. at 126].

This language was applied by the Supreme Court of Illinois in Inter-Ocean Publishing Co. v. Associated Press. [184 Ill. 438, 56 N.E. 822 (1900)]. At issue was the question of whether a major news agency could refuse to sell its product to the plaintiff. The court answered: "The Associated Press . . . sold its news reports to various newspapers . . . , and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which the corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public and its private property." [Id. at 442, 56 N.E. at 825.] The court also stated:

Scarcely any newspaper could organize and conduct the means of gathering the information that is centered in an association of the character of the character of the appellee because of the enormous expense, and no paper would be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and if they are prohibited from publishing it, or its use is refused them, their character as newspapers is destroyed, and they would soon become practically worthless publications. Ibid.

News was gathered by the Association to be sold; and all newspaper publishers desiring to purchase such news had the right to do so without discrimination. Of the Association the court noted:

Its obligation to serve the public is not one resting on contract, but grows out of the fact that it is in the discharge of a public duty, or a private duty which has been so conducted that a public interest has attached thereto.
[Ibid.]

Nineteen years after the Inter-Ocean decision a lower court in Ohio held that a newspaper could not reject an offered advertisement. [Uhlman v. Sherman, 22 Ohio N.P. (n.s.) 225 (1919)]. The hope offered for advertisers by these decisions, however, was short-lived. With unusual unanimity, the rulings were either rejected or distinguished. State laws requiring newspapers to accept and publish political advertisements, tax lists, or even the findings of a minimum wage commission at regular newspaper rates were declared unconstitutional. [Belleville Advocate Printing Co. v. St. Clair County, 336 Ill. 359, 168 N.E. 312 (1929); Lake County v. Lake County Publishing & Printing Co., 280 Ill. 243, 117 N.E. 452 (1917); Wooster

v. Mahaska County, 122 Iowa 300, 98 N.W. 103 (1904) (publication of tax lists); Commonwealth v. Boston Transcript Co., 249 Mass. 477, 144 N.E. 400 (1924) (publication of findings of Minimum Wage Commission). See also In re Louis Wohl, Inc., 50 F.2d 254 (E.D. Mich. 1931); Fisher v. News Journal Co., 21 A.2d 685 (1941 Del. Ch.); Shuck v. Arnoll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1933); State v. Associated Press, 159 Mo. 410, 60 S.W. 91 (1900).

The right of contract was preserved. The rationale of Inter-Ocean, despite its logic, was not determinative.

The arguments were termed "interesting," but not "persuasive." Quoting Mr. Justice Holmes one court stated:

The notion that a business is clothed with a public interest, and has been devoted to a public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. [In re Louis Wohl, supra. (The newspaper refused to accept plaintiff's advertising unless a prior debt which earlier had been discharged in bankruptcy was first settled.)]

Nevertheless, suits continued to be brought under the "public interest" theory. As late as 1954 the proposition was raised against the almost overwhelming weight of precedents; an advertiser was grasping for means to cause the dominant newspaper in its city to accept advertising copy. [Poughkeepsie Buying Serv. v. Poughkeepsie Newspapers, 205 Misc. 982, 131 N.Y.S.2d 515 (Sup. Ct. 1954). In support of its decision the court cited Lepler v. Palmer, 150 Misc. 546, 270 N.Y. Supp. 440 (Sup. Ct. 1934); Collins v. American News Co., 34 Misc. 260, 263, 69 N.Y. Supp. 638, 640 (Sup. Ct. 1901), aff'd, 68 App. Div. 639, 74 N.Y. Supp. 1123 (2d Dep't 1902).] The

newspaper was termed a private, not a public, business.

One may predict that the "public interest" concept will not be forgotten. Those injured by the arbitrary exercise of newspaper power will maintain their battle to seek redress. In the struggle courts will find it difficult to ignore the effects of the growing concentration of newspaper ownership.

Thus, consider the following: "'concentration ratios' computed by the Census Bureau from the 1954 census of manufacturers show four newspaper publishing companies received 177 of the \$2,058,975,000 in newspaper advertising revenue in 1954. . . .

"The tabulations also show the next four biggest newspapers got 257 of the \$840,867,000 of receipts from subscriptions and sales, with the next four receiving 67 and the next twelve, 970." Advertising Age, July 29, 1955, p. 6, col. 5. See also Advertising Age, April 6, 1959, p. 89, col. 5:

James Russell Wiggins, executive editor of the Washington Post and Times Herald, attributed the consolidation trend in the newspaper business to the advertiser's preference for buying a market's top paper and only that. He indicated that the advertiser's preference has put a 'premium on the best and made the role of the second, third and fourth ranking best increasingly difficult.' Lady Jackson (Barbara Ward) noted that this same problem has led to a tremendous concentration of newspapers in England. "We have seen since the war a number of newspapers that could not hold up because the moment they lost the top figure of circulation, there was a massive switch of the advertisers to their competitors, and many of them just folded."

They will have to decide whether a newspaper in a monopolistic position is not, for some purposes, vested with a public interest. Newspaper managements, if they are wise, will gage their actions accordingly; they will act responsibly, and not await the harsh publicity of a law suit.

(c) Canada: Antitrust---Refusal to Deal

On July 15, 1969 Mr. W. Gold of the Senate Staff Research Group conducted an interview with Mr. David Henry, Director of the Canada Combines Investigation Branch. Two points relevant to this topic were made by Mr. Henry: (1) Canadian anticomberines law is not intended to achieve "social policy" as applied to media. (2) There are significant limits in having the law reach advertising which for many purposes must be deemed a service rather than a commodity and thus outside the ambit of Federal jurisdiction. Mr. Gold summarized the points made by Mr. Henry [Interview at pp. 3-4]:

2. In the view of its administrators the Act gives no scope whatever for social policy considerations in the media field. The whole presumption of the legislation is that it shall be used in the field of the manufacture and sale of articles for ultimate public consumption and such newspaper studies as have been launched so far hang on the slender thread that a newspaper is indeed a commodity which is sold for 10 or 15 cents. There is no legislative basis for concern and action in the field of contraction of sources of information, ideas, vehicles of communication, etc.

3. Branch officials have spent some time trying to find a plausible way to stretch the existing Act to cover broadcast advertising and public information as commodities, but have decided that they simply cannot do so. Advertising

and information are services and arrangements for joint, combined or packaged advertising rates, could, in the view of the Branch, only fall within the purview of the Act in the event that these were overtly used to drive a competitor out of business or to prevent a competitor from entering business. In a static situation wherein competition has long been absent and no potential but incapacitated competitor can be defined, advertising is considered clearly a service uncovered by the commodity orientation of the existing Act.

The opportunity to judge clearly the present and possible future role of anticombernes law came with the Interim Report on Competition Policy. [Economic Council of Canada, July, 1969] The terms of reference to the Economic Council contemplated a statement on these points. As a threshhold matter the Council emphasized that any anticombernes law "should aim primarily at bringing about more efficient performance by the economy as a whole." [Id. at p. 9] That is, anticombernes is directed toward economic efficiency. Such a statute is not intended to achieve social ends; it is not intended as a vehicle to compel access by individuals. Even if there were a provision covering newspaper refusal to sell advertising space to a citizens' group bent on social reform, the law would not be relevant. The citizens' group is not directing their effort toward competition; as a group it is simply attempting expression. Indeed, at a later point in its report the Economic Council eliminated the modifying word "primarily" and declared: "We have put forward in this Report the view that the encouragement of economic efficiency should be the objective of Canadian competition policy, and it is

accordingly in relation to this objective that the present legislation should be assessed." [Id. at p. 63]

Existing references in the Act touching refusal to deal are limited: "The Act now covers refusal to sell only when used to enforce resale price maintenance." [Id. at p. 66] The Economic Council did not significantly alter the law encompassing refusal to deal as it is defined in Section 34 of the Combines Investigation Act. To the extent that the refusal is keyed to resale price maintenance it comes near being a per se offence. [Id. at pp. 101-10]. The Council then recommended that the appropriate regulating agency only have the power to make general inquiry into all other refusals to deal. [Id. at pp. 121-22]. Commenting on this power the Economic Council stated:

It should be re-emphasized that none of the above classes of practices would be an offence or be banned as such. Only where there was reason to suppose that their use in a particular situation might be having a deleterious effect on the public interest would they become the subject of hearings by the tribunal. Argument and evidence would then be received by the tribunal from the parties involved in the practice and from the Director of Legal Proceedings. Factual evidence could also be requested from the tribunal's professional staff, subject again to the proviso that such evidence be made available to the parties involved in the practice and to the Director of Legal Proceedings.

In examining any trade practice, the tribunal, having regard to its general terms of reference, would, above all, be concerned with whether the practice was likely to lessen competition to the detriment of final consumers. Not the interest of particular competitors but the interest of ultimate purchasers would be paramount. [Ibid.]

The facts compel this conclusion: There is nothing in the law compelling a newspaper to sell advertising space. The Economic Council evidently believes that anticombinations legislation is not the vehicle for achieving the social policy contemplated in the proposal stated above. But the means to exist under the Federal government's criminal power to draft the kind of statute embodying the proposal.

B. BROADCASTING

1. SETTING FOR REGULATION

From the beginning Parliament understood the potential of broadcasting. Perhaps, because of this, care and restraint were exercised in formulating policy. Indeed, it was nine years after the first radio began the now familiar format of "gramophone records, news items and weather reports," [Frank W. Peers, The Politics of Canadian Broadcasting 1920-1951 (University of Toronto Press 1969) at p. 4.] that a Royal Commission entered its report on the significance of the new industry together with a recommendation on the direction that policy should take. The Commission stated:

The potentialities of broadcasting as an instrument of education have been impressed upon us; education in the broad sense, not only as it is conducted in the schools and colleges, but in providing entertainment and of informing the public on questions of national interest. Many persons appearing before us have expressed the view that they would like to have an exchange of programs with the different parts of the country.

At present the majority of programs heard are from sources outside of Canada. It has been emphasized to us that the continued reception of these has a tendency to mould the minds of the young people in the home to ideals and opinions that are not Canadian. In a country of the vast geographical dimensions of Canada, broadcasting will undoubtedly become a great force in fostering a national spirit and interpreting national citizenship.

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We have examined and considered the facts and circumstances as they have come before us. As our foremost duty, we have concentrated our attention on the broader consideration of the interests of the listening public and of the nation. From what we have learned in our investigations and studies, we are impelled to the conclusion that these interests can be adequately served only by some form of public ownership, operation and control behind which is the national power and prestige of the whole public of the Dominion of Canada. [Report on the Royal Commission on Radio Broadcasting (King's Printer 1929) (Aird Report) at p. 6.]

The concern of the Royal Commission and Parliament went far beyond the allocation of frequencies which, to some extent, already had been covered by the 1913 Radiotelegraph Act. The thrust of inquiry went to program content. The first Royal Commission, like the others that followed, addressed itself to what Canadians were being given over the air waves. And, like most of the other inquiries, the first Royal Commission came into existence because of a specific controversy which, interestingly, was [†]religious rather than political.

By 1928 many Canadian stations were operated or under the financial control of religious groups. "In Vancouver, the United Church of Canada, the Presbyterian and the International Bible Students Association (an organization of Jehovah's Witnesses) all had radio stations. The International Bible Students had stations also in Edmonton and Saskatoon. Another Edmonton station belonged to the Christian and Missionary Alliance. In Toronto, the situation was more complex. One of the stations, CJYC, operating as an ordinary commercial station, was owned by Universal Radio of Canada. Sharing its facilities was phantom station CKCX, licensed to the International Bible Students. Two other religious organizations had phantom stations as well, St. Michael's Cathedral (Roman Catholic) and the Jarvis Street Baptist Church. As a rule, phantom stations broadcast about once a week, but CKCX was on the air about eight times as often. Many people guessed (rightly) that Universal Radio of Canada was really owned by the International Bible Students Association". [Frank W. Peers, The Politics of Canadian Broadcasting, supra, at p. 30.]

The Bible Students were not passive, but strident in sheer use of radio time. Complaints came to the relevant Minister of attacks being made by the Bible Students against other religious bodies. A decision was made to cancel the licenses of the four stations run by the Bible Students. And, out of that decision came questions. From the Labour member for Winnipeg North came queries and a proposal:

When did we appoint a minister of this government as censor of religious opinions?

It is stated that the Bible Students condemn other religious bodies....If the Bible Students are to be put out of business because they condemn alike Catholics and Protestants, I do not see why the [Orange] Sentinel and the Catholic Register should not be suppressed.....

Our forefathers won to a considerable extent freedom of speech, freedom of the press, freedom of assembly; surely it is strange that a Liberal government should seek to deny people freedom of the air.

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I know there are dangers associated with the control of radio by the government. I know there would be great danger with radio in the hands of the Baldwin government, and I imagine there would be dangers with radio in the hands of even a Canadian Liberal government....There are always admittedly dangers in any one group controlling such an agency, but there are even greater dangers in allowing things to drift along as they are at the present time in Canada. [id, at p. 32]

From the government came a response. It did not like the task performed; it would rather see such responsibility taken away from politics. No government, it might be added, particularly cares to receive 9,000 letters of protest and a petition bearing 458,026 names. So, it was that the relevant minister, Mr. Cardin, stated:

We have made up our minds that a change must be made in the broadcasting situation in Canada. We have reached a point where it is impossible for a member of the government or for the government itself to exercise the discretionary power which is given by the law....for the very reason that the moment the minister in charge exercises his discretion, the matter becomes a political football and a political issue all over Canada....We should change that situation and take radio broadcasting away from the influences of all sorts which are brought to bear by all shades of political parties. [id, at p. 33]

The Aird Commission, a Royal Commission, was established. Its terms of reference by Order in Council were broad. It was required "to examine into the broadcasting situation in the Dominion of Canada and to make recommendations to the Government as to the future

administration, management, control and financing thereof." The Commission did not forget in its brief, 16-page final report the controversy that led to its establishment. Specifically, the Commission said of religion: "The representative bodies which we have suggested to advise upon the question of programs would be called upon to deal with the matter of religious services, and it would be for them to decide whatever course might be deemed expedient in this respect. We would emphasize, however, the importance of applying some regulation which would prohibit statements of a controversial nature and debar a speaker making an attack upon the leaders or doctrine of another religion." [Aird Commission Report, supra, at p. 11]

Then the Commission made what at the time might have been only a small leap. It moved from the formal heading of religion to that of politics. And, it carried forward the recommendation of "no controversy". Said the Commission: "While we are of the opinion that broadcasting of political matters should not be altogether banned, nevertheless, we consider that it should be very carefully restricted under arrangements mutually agreed upon by all political parties concerned." [Aird Commission Report, supra, at p. 11.]

That which led to the first major review of broadcasting should not be discounted. Though there was concern over foreign, or more precisely, American ownership and program domination, it was a Canadian controversy over religious broadcasting that brought on the Aird Commission. Next, the nature of that controversy dealt with substantive programming. Neither the Government nor the Commission shied away from the problem of program content on the ground of freedom of speech. Finally, the Commission, recognizing the potential of broadcasting, sought to place ownership in public hands so that--as a primary goal--there might be access to all Canadians by Canadians. And, in doing this, the Commission did not flinch from suggesting restriction, censorship, in two highly sensitive areas, religion and politics.

The difficult, but uniquely Canadian path marked by the Aird Commission not only was accepted and brought into law, but continues as such today. The primary goal remains: Bring Canadian broadcasting to Canadians. In this context freedom of expression stands as a right articulated by the Parliament, but necessarily qualified by the regulating agency. And, in so doing, Parliament can escape the kind of criticism mounted in its revocation of licenses held by a religious body. After all, now it is not Parliament but an independent agency that imposes sanctions, and its actions are subject to judicial review. Should that agency go too far or not far enough, and should the public protest be of sufficient magnitude, Parliament can always investigate and criticize in the name of the people.

To illustrate the role carved for itself by the legislature consider the current broadcasting act and the regulations of the Canadian Radio Television Commission. In unambiguous language the act states: [All persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned]. [Section 2 (c), 16-17 Elizabeth II, c. 25, 1968].

Yet, in a rather significant way agency regulations have modified what appears to be a firm right. Indeed, nearly all of the agency's published rules constitute statements of what a license shall not broadcast. Section 5(1) of the Radio (AM and FM) and Television Regulations begin, "No station or network operator shall broadcast.....". There then follows an itemization of ten matters which it may be useful to restate. This is done in Appendix B-1. It is enough here to note the second forbidden item: "any abusive comment or abusive pictorial representation on any race, religion or creed....." [98 The Canada Gazette Part II, Feb. 12, 1964 at p. 172].

And the regulations, using the problem relating to religious ownership as an example, have, in turn, been extended in their sweep. As recently as October 18, 1968 the Canadian Radio-Television denied the application of Wesley United Church Radio Board for an FM license to broadcast at St. John's, Nfld. In the statement of denial the agency made clear its position: "The commission also confirms the long standing policy of not granting licenses to religious organizations. The Commission will consider applications for non-commercial community stations, only when they are supported by a broad cross-section of groups and individuals in the community to be serve."
[Decision CRTC 68-60].

2. REACHING CANADIANS--THE CANADIAN BROADCASTING CORPORATION AS THE PREEMINENT FORCE

Despite the number of private broadcasters the Aird Commission, and then the Parliament firmly stated a goal to develop a national broadcasting system under public control so that Canadians could learn and speak with each other. To fulfill that mission, full responsibility was placed in the hands of a crown corporation, the Canadian Broadcasting Corporation. The CBC had the power not only to allocate channels, and to deny licenses, but also to build a network using public and private monies. Yet, in assigning the CBC this task there was no indication given that private broadcasters be eliminated. And, indeed, for a period of twenty-five years they flourished only at the end of that time to demand separate recognition, to ask that an independent regulatory authority be created. Government responded by establishing another royal commission. Except this time, the terms of reference were far broader than those given the Aird Commission. The new study group was designated the Royal Commission on National Development in the Arts, Letters and Sciences. It reflected an effort to view broadcasting in a Canadian context, in terms of effect on Canadian culture.

This second commission heard and responded fully to the

to the private broadcasters and their association, the Canadian Association of Broadcasters. The CBC, said the commission, had proved successful in meeting the challenge of "cultural annexation to the United States". Indeed, CBC in many areas of Canada serves as the only link between the residents and the outside world. [Report, Royal Commission on National Development in the Arts, Letters and Sciences--1949-1951, King's Printer, 1951, at p. 280 (2d Commission)]. This, however, is not to deny the "place made for themselves in their own communities" by the private station. [id at p. 281].

Extended space was given by the second commission to the arguments of the private stations. Though lengthy, at least a portion of the commission's remarks bear repeating, for they were accepted by Parliament:

29. We wish to acknowledge here the frankness and clarity with which the private broadcasters have presented their views. It must, however, be obvious, from what has already been said, that we cannot agree with their conclusions. We believe that Canadian radio broadcasting legislation contemplates and effectively provides for one national system; that the private stations have been licensed only because they can play a useful part within that system; and that the C.B.C. control of network broadcasting, of the issue and renewal of licences, of advertising and of other matters related to radio broadcasting, is a proper expression of the power of the C.B.C. to exercise control over all radio broadcasting policies and programmes in Canada.

30. The principal grievance of the private broadcasters is based, it seems to us, on a false assumption that broadcasting in Canada is an industry. Broadcasting in Canada, in our view, is a public service directed and controlled in the public interest by a body responsible to Parliament. Private citizens are permitted to engage their capital and their energies in this service, subject to the regulations of this body. That these citizens should be assured of just and equal treatment, that they should enjoy adequate security or compensation for the actual monetary investments they are permitted to make, is apparent.

We shall have recommendations to make on this matter later. But that they enjoy any vested right to engage in broadcasting as an industry, or that they have any status except as part of the national broadcasting system, is to us inadmissible.

31. Before 1919, there was in Canada no property interest in any aspect of radio broadcasting and no citizen's right with regard to broadcasting. From 1919 to 1932, some citizens enjoyed, under licence, the privilege of radio broadcasting. In 1932, the Parliament of Canada, with full jurisdiction over the whole legislative field of radio broadcasting communication, established a commission "to carry on the business of broadcasting" in Canada by a system which contemplated the subordination and final absorption of private stations. In 1936, the C.B.C. was constituted to "carry on a national broadcasting service within the Dominion of Canada". It was given for that purpose the very powers over private stations which are now the subject of complaint. The only status of private broadcasters is a part of the national broadcasting system. They have no civil right to broadcast or any property rights in broadcasting. They have been granted in the national interest a privilege over their fellow-citizens, and they now base their claim for equality with their "business rivals" on the abundant material rewards which they have been able to reap from this privilege. The statement that the Board of Governors of the Canadian Broadcasting Corporation is at once their judge and their business rival implies a view of the national system which has no foundation in law, and which has never been accepted by parliamentary committees or by the general public. The Board of Governors is the national authority under whose direction the private stations exercise their privileges and with whom their arrangements are made.

32. We wish to recognize fully the private stations as important elements within the framework of our national system. We shall be making recommendations designed to remove certain inconsistencies of which they have reasonably complained. But we are resolutely opposed to any compromise of the principle on which the system rests and should rest. Radio has been the greatest single factor in creating and in fostering a sense of national unity. It has enormous powers to debase and to elevate public understanding and public taste. Believing as we do that it is an essential instrument for the promotion of unity and of general education in the nation, we cannot accept any suggestions which would impair the principles on which our present national system is based.

33. This does not mean that we claim perfection for the system or that we are not impressed with the importance of taking every possible measure for the further improvement of programmes. We have had this matter in mind in framing the financial recommendations which follow, and in certain recommendations on programme production. We are, however, convinced that the policies advocated by the private stations must lead to an extension of the commercial tendencies in radio programmes which are already too strong, and which have been the subject of much complaint. We were particularly impressed by the fact that few of the representatives of private stations who appeared before us recognized any public responsibility beyond the provision of acceptable entertainment and community services. The general attitude was that the government might, if it chose, subsidize "cultural programmes" but that the private stations must be left free to pursue their business enterprise subject only to limitations imposed by decency and good taste. We offer no criticism of this frankly commercial attitude; we cite it only as evidence that those who honestly hold these views are not primarily concerned with the national function of radio. Indeed the improvement of national programmes was not urged by the Canadian Association of Broadcasters as a reason for the reorganization of the national system or for any concessions to commercial groups. [id at p. 283-85].

Through purposeful decision the CBC was placed in a position of supremacy for more than 25 years. It not only had the opportunity, but it was given the affirmative responsibility to mold Canadian broadcasting. Yet, in this regard, its terms of reference never were open-ended. Priority was given to the technical problem of Canadian-owned stations reaching all Canadians. But, the lines of communications never were intended to be entirely free. Perhaps, even as an ideal this is not possible. The question, however, was moot. The Aird Commission and the first Broadcasting Act --even as it is carried forward today--set strictures on program content.

3. CONTROVERSIAL BROADCASTING AND THE CANADIAN BROADCASTING CORPORATION: INTERNAL CENSORSHIP AND RELATIONS WITH GOVERNMENT.

The CBC is not a person, but an institution. As such any measure of attitude concerning controversial broadcasting or accuracy in news or public affairs programming properly begins with a statement of institutional structure--for the CBC follows the view of the current Broadcasting Act: It is the Corporation which bears ultimate responsibility for that which it disseminates. [1968 Broadcasting Act, Section 34]. Freedom of expression, access to the airwaves, under the Act, must be determined by the Corporation--not its individual employees. So it is that the CBC has stated in its preface to a manual on programming policies and procedures: "Program Policy is the framework within which program authority is exercised in the Corporation, either directly or by delegation to others....CBC Management exercises its authority over program activities with the sanction of established program policy. In holding the staff accountable for program decisions the Corporation undertakes to state policy in clear and comprehensive terms and to make it readily available to all personnel." [Programming: Policy and Procedures--CBC Program--A Preface (1965) at p. 2].

Through its manual the Corporation, like many other enterprises such as government agencies, exercises control through rule-making. That is, the CBC sets guidelines binding on its personnel. In this regard, it is worth noting that most of its preface to the manual of rules relates to the need for CBC employees to exercise affirmative duties toward the end of stimulating Canadian creative genius and bringing to Canadians issues of controversy:

In the course of years it is hoped that the impact of CBC programs will enlarge the understanding and stimulate the creative genius of Canadians. Understanding and sympathy is a vital need for a country like Canada, a nation embracing two languages and two cultures, sectional economic interests, and a scattered population. CBC programs have a special responsibility to increase effective communication among all Canadians and all parts of Canada.

One of the tests of a healthy democracy is the tolerance of unpopular minority opinions, of new expressions of ideas in art, either native or imported. The CBC has a responsibility to see that seriously held minority views and important new ideas in art and thought find a place in its programs, along with the more conventional, despite the discomfort and criticism this may provoke among some sections of our audience.

In the encouragement and development of Canadian activity in the arts--music, drama, ballet, design --the CBC sets its sights at the international level. The world of creative art and expression is increasingly international and national standards, like good currency, should be freely exchangeable among civilized peoples. Among the main broadcasting agencies of the world CBC standards must compete at a high level of excellence.

The vitality and social relevance of CBC programs can only be maintained by constant and constructive criticism. Such criticism, wherever it originates, helps to maintain and improve artistic and technical standards, to inform and stimulate program producers and schedulers, to distrust complacency and preserve good taste. The CBC has a constant duty not only to maintain recognized standards in its programs but also to create new ones in keeping with the nation's growth and scientific, artistic and social advances. In their multiplicity and variety CBC programs should help to quicken and enrich Canadian life in all its aspects. To help in reaching that objective is the responsibility of every member of CBC staff. [id, at p. 3.]

CBC rules will form a primary base for discussion; this will follow in a later subsection. It is enough at this point to indicate that as a device rule-making is ranked as the primary method of employee control. The view seems to be on the part of CBC management, that a cohesive body of rules can be shaped which fairly states corporation objectives. This done, it is up to each employee vigorously to carry those goals forward to program implementation. As we shall see, there may be some question as to whether goals can be clearly articulated. Further, and this is most important, rule-making is a primary, not an exclusive method for control. There are other means to insure adherence to management's desires.

In three vital areas realistic ultimate control rests with management. These relate to employment, promotion, and program material. It is management which sets the guidelines that define the conditions under which one may enter CBC as an employee. On their face the rules seem entirely fair; anyone may apply. Everyone will be considered on the merits. But, as with any large enterprise where there must be a large measure of delegation, rules have been broken. Program producers, given authority to hire script-writers at salaries less than \$10,000 a year, from time to time were charged with avoiding the merit system

and employing individuals who, as such, owed the producers a certain special loyalty over that due the Corporation. [Generally, see Minutes of Proceedings and Evidence, Special Committee on Broadcasting, House of Commons, Fourth Session, 24th Parliament 1960-1961] hereafter referred to as Parliamentary Hearings) at p. 519, 542-43]. Those employed at salaries over \$10,000 would first have to be cleared by top management and the CBC Board [id at p. 446.].

Initial employment usually would take place at lower levels. There was reason for this. It was stated CBC policy, so the management stated in lengthy Parliamentary Hearings of 1960-1961, to promote from within, to take those employees most deserving and give them first chance at any job opening. [id at p. 543]. One obvious result of such a policy is to create a sense of family within CBC. Not only the most capable people would tend to get promotions, but also those who would be trusted--a fact which could be ascertained amply from their seniority.

Finally, management has the means and responsibility to control and shape programming. This is not a matter left to the staff. In a very real sense, the Parliamentary committee was told that the Corporation's Board assumed responsibility in this area. Planning, program decisions often are taken 15 to 18 months in advance of actual showing. Coordination takes place down the line. While there may be considerable responsibility delegated to a producer [id at p. 512], he is accountable to his department head. [id at p. 427]. "Now, possible duplication, say, between public affairs and outside broadcasts is a matter which must be co-ordinated, and duplication must be avoided by their chief, the head of programming for the division. So, because of the numerous meetings, which are held between the various supervisors and the several program specialists, it is possible to coordinate very well the whole activity of that division....It is the responsibility of the general managers to the program council in Ottawa to make sure that the divisions themselves are coordinated." [ibid]

Where policies are clearly stated, testified the President of CBC, for example "the allocation of time to political parties", there are no difficulties in execution of those goals. But, on the other hand, "when you come to the application of a policy such as good taste....it is a very difficult one to describe in words. Therefore, for those programs which involve the interpretation of policies which cannot be written down in a specific manner as to how they will be applied in a specific case, then there must be consultation between the line...the general managers and the vice-presidents. In this case, it would be with the vice-presidents of programming." [id at p. 465]

In the nether world of controversial programming the role of management becomes arcane. The CBC Board, we are told, consists in part of full-time employees of the Corporation. [id at p. 471] The Board, itself, has a Program Committee which meets one full day prior to each Board meeting. [id at p. 472] What is the Committee's function? Said the President of CBC in 1961:

The committee systematically reviews all the highlights of our program activities. It reviews anything of importance or anything that has turned out to be controversial. Then, of course, the directors come to the board meeting and they bring with them any personal observations they may have, or any observations which might have been passed on to them, observations they may have read in the press, or comments made to them. Usually they come with pretty lively suggestions with respect to the programs which have appeared on the screen or had been heard on the air during the previous two months.

In certain cases a program may be the subject of prolonged discussion. It may be discussed for an hour, two hours or a whole half day. This would happen where a program might be of a controversial nature or where a matter of policy might be involved, either the interpretation of established policy or the formulation of a new one. They would also systematically review the balance of representation in opinion programming. In addition, the board through its program committee has studied each of our policies in turn as they apply to specific areas. Recently we were studying the whole field of music; before that we studied talks and news, and religious broadcasting so that eventually we shall have covered the whole field of our policies in programming.

That is how it is done in the field of programming and in a similar or perhaps in a more detailed way, there is a study and a very thorough one, I may say, of everything which goes on in the corporation in terms of finance activities. [ibid]

The results of the Board's meeting often are not formally announced. Minutes are kept. But they are not made available without the expressed permission of the Board. [id at p. 471] A fair amount may be gleaned of that which comes before the Board. It is known, for example, that reports of employee "breach of ethics" may be forwarded for consideration. It is known, too, that the reports often are in writing. [id at p. 468] But, little, if anything, is known of the disposition of such matters, except in terms of result (i.e. a program may be cancelled, or an employee discharged). The rationale for such action is subject only to guess. Even the underlying issues may only be approximated. For the sake of discipline and managerial prerogative there may be an argument for the state of affairs described. But, this much is certain: Unstated policy can lead not only to employee complaint, but public criticism.

Surely, in the Parliamentary Hearings it must have been a little difficult for the Corporation to announce that some employees in sensitive program positions were given security checks as a condition to maintaining their jobs. In this regard, specific reference was made to interviewers talking with "people from all over the world". [id at p. 512] The CBC President explained that the check was only part of the task performed in insuring control. He said:

May I add something to what the vice-president has said. I think the important point to make there is that while the producer may be delegated considerable freedom in certain cases when he needs it in order to get the program done, then, of course, it is up to the supervisor to double check him at any point where he feels double checking is necessary and particularly if it is in a sensitive area, in which case the supervisor takes a closer hand in the whole process. Now, I do not think there is any outside artist who is engaged and given a

completely free hand as to who he will himself employ to help him to do his project. All of this goes back to the supervising producer, the executive producer, or the supervisor, depending on the situation. [id at p. 512]

What emerges from the facts stated is a corporation which, like any other has an intricate chain of command that functions well when institutional goals can be firmly declared. Where, however, those goals can only be defined in terms of issues, they become matters of discretion that can result in severe internal conflict between management at the middle level and employees in the creative departments, such as public affairs. In the final analysis conflicts springing from controversial programming bring the catalyst of public and political reaction that force top management to resolve the issues.

The problem becomes more significant in circumstances where the Corporation is realistically responsible to none. For government there is the difficulty of a dilemma. The CBC is Canada's only national network. Its position gives it immense power through contact with all Canadians. Should any government oversee or check the activities of the CBC in a meaningful manner there is the risk of criticism not unlike that which gave rise to the Aird Commission. Indeed, according to Professor Frank W. Peers of the University of Toronto, the government once again felt strongly public reaction for possible interference with CBC activities in 1942. At issue was a plebiscite to the people from Prime Minister King seeking release from his pledge of 1939 not to impose conscription for overseas service. Eleven members from Quebec voted against the government plan. The plebiscite announced on January 22, 1942, was to be held on April 27. The question was whether the Quebec opposition, organized formally in La Ligue pour la Défense du Canada would be given air time to speak their views not only to Quebec, but the nation.

If the plebiscite were considered an election, then there would be no doubt, or so it seemed. The Ligue would be given free time in which to state its position. In any event, CBC stations would not sell time, for the matter at hand surely was political and controversial. On April 4, slightly more than three weeks before the vote,

CBC announced its decision. Both CBC networks, English and French, would be restricted to use by the Prime Minister, members of the Cabinet, and leaders of the recognized parties in the House. This left out the Ligue and the eleven dissenting members. Evidently, the decision came not from the CBC, but the government itself without explanation. Professor Peers wrote [The Politics of Canadian Broadcasting, 1920-1951, *supra*, at pp. 330-31]:

The results of the plebiscite showed the deep difference of opinion between French and English speaking Canadians. Only 27 per cent in the province of Quebec voted "yes"; in the remainder of the country, the affirmative vote was 80 per cent.

For the next two or three years, *Le Devoir* never took seriously protestations that the CBC was non-partisan and independent of the government; over and over it recalled the matter of the plebiscite. The English press in Canada was almost completely silent and indifferent. The *Montreal Gazette* expressed the general sentiment when it said that the government was well within its rights in giving free radio time only to "yes" proponents. It said no recognized political party was advocating a "no" vote; "if any party favored a No vote, it could use its allotted time to urge that course."

By 1963 the independence of CBC seemed assured. Not again was government charged with interference. But, the problem of control remained. On this point the Royal Commission on Government Organization wanted itself understood. True, there were lines of reporting. The Corporation must report to Parliament through a minister designated by the Governor in Council, now the Secretary of State. However, the Secretary serves primarily as a reporting vehicle. He is not accountable for the policies of the Corporation, nor must he give it direction either in terms of programming or daily activity. Questions asked in Parliament simply are referred through the minister to the Corporation for answer. As to financing, a matter that obviously could affect programming, there is apparently greater control: Both the Secretary of State and the Minister of Finance must receive and approve the Corporation's operating and capital budgets which then, on an annual basis, are laid before Parliament. Further, every five

years the Corporation must make a capital program and financial forecast which is submitted to the Governor-in-Council, which also has the duty of approving any property transactions involving more than \$100,000.

"In practice, the budgets of the Corporation and all contracts in excess of \$100,000 are reviewed by the Treasury Board. The Creditor General of Canada is the auditor of the Corporation and reports annually thereon to Parliament." [4 Royal Commission on Government Organization (Glassco Commission) at pp. 25-26 (1963)].

The reality of Corporation review by Government rested with the Treasury Board. "Each year", said the Glassco Commission, "Parliament is asked to vote the funds necessary to bridge the gap between corporate income and outgo. The scrutiny of these budgets is carried out by the staff of the Treasury Board, the outcome being usually an arbitrary reduction in the operating budget of three or four millions of dollars. No direction is given the Corporation concerning the control of either revenue or expenditure." [id at p. 27]

The lack of direction by government could be tolerated if either statute or the corporation itself had defined its mission. But, the Glassco Commission said, this has not been done:

Virtually the entire terms of reference to the Corporation have since its formation consisted of a simple direction; to carry on a "national broadcasting service". In the absence of any statutory or authoritative definition of that phrase, the Corporation has over the years made its own interpretations and then proceeded to create the sort of service which it considered appropriate.

In many fields compliance with a general direction of this nature would not be difficult. A direction, for example, to operate a ferry service would implicitly create boundaries for the activity in the form of the nature and volume of traffic and generally accepted practices in meeting the physical aspects of the task. But there are no such boundaries in a new and growing field such as broadcasting--a national broadcasting service can take a hundred forms, ranging in cost from a few million dollars to more than the hundred million now being spent [id at p. 25]

The Commission found, too, that the responsibility for decision-making within the Corporation had not been exercised. The Corporation's Board was not passing upon matters fundamental to the entity's well being. Rather, decisions affecting corporate policy were being left to CBC operating management. The Board was charged with being a group of directors in name only. The Commission urged a Board that took the responsibility that it was assigned. [*id* at p. 31] In this regard, the Commission urged creation of a single spokesman on behalf of the Corporation. It was to be the link with government. [*ibid*] Finally, government was urged to assert itself, to aid the Corporation in marking a path:

The nature of the Corporation's task demands that it possess great independence from the political process in the day-to-day conduct of its activities. But this does not mean that it must be handed a blank cheque. Thus, in matters of broad policy governing the shape and nature of the Corporation's development, there is an inescapable responsibility on the government to give guidance. An independent board of directors will normally welcome informal policy guidance and has an obligation to ascertain the views of the government before giving effect to any important change in policy. To make effective a minimal degree of essential control, the minister responsible should have the power to give formal direction to the board. A requirement that such power when exercised be made public would pinpoint responsibility. Experience elsewhere indicates that where such power exists, it is used sparingly, but the existence of the power serves to further a satisfactory relationship between those bearing different parts of the total responsibility. [*ibid*]

Two years after the Glassco Commission came another government study, The Report of The Committee on Broadcasting (The Fowler Committee) (1965). It pointed to *inter alia* one specific aspect of the lack of government direction, namely, the failure on the part of CBC to hire and train young, competent people. The Report stated: "There has been a major shift in the age distribution of the Canadian population, with the number of young people under 30 increasing substantially, but this population shift has not been reflected in the staff of CBC, which is not attracting its share of gifted young people. Public broadcasting should be an attractive and rewarding career for young Canadians,

but there is little evidence it is so regarded. In the result not only do young Canadians miss the opportunities that CBC can provide, the CBC itself is a loser. It is missing the new ideas and new talents that youth can bring to its service. This is something that needs active attention." [The Fowler Committee, at p. 162].

The CBC defended itself by pointing an accusing finger at government. The Corporation had the burden of expanding facilities. Yet, at the same time, government each year had slashed the Corporation's budget by one or two millions. CBC was left with no choice but to delay any training program. [id at p. 16]. Not so, said the Fowler Committee. Government cuts were not directed toward specific items, but rather the total annual operating budget. The Corporation could have established a scale of priorities. And, it might be added, if the Corporation failed in this task, Government could have intervened. None could argue partisan politics by supporting a program that would result in the CBC hiring and training competent young people.

It is this failure to establish priorities that allows the CBC to drift often in the area of programming, to impose a rigid system of controls that are pointed toward no particular ends other than control. For CBC in the Canadian context it is a much simpler, less controversial path, to concentrate its resources on expanding its service to reach throughout Canada.

4. CONTROVERSIAL BROADCASTING: THE RELATIONSHIP BETWEEN THE CBC AND THE CANADIAN RADIO-TELEVISION COMMISSION

In its 1965-1966 Annual Report the CBC devoted considerable space to reply to the 1965 Report of The Committee on Broadcasting. [See CBC Annual Report 1965-1966 at pp. 111-XX (June 30, 1966)]. A primary issue was, at this late date, the nature of any Canadian broadcasting authority. More precisely, should the authority be structured as a one or two-board system. The CBC made itself clear as to what it desired: Broadcasting had grown too complex for the one-board structure originally imposed by the Parliament. "The question of one board or two boards should be decided on practical grounds. Canadian broadcasting has already moved considerably away from the original single system concept and toward the ultimate separation of its publicly-owned elements. This separation may take years but any major move in the overall administration of the system, or systems, should be geared to the needs of the future and not to those of the past." [Id. at p. vi.]

Having recognized the need for an "ultimate separation of its publicly-owned elements," it is worth noting the division of power desired by the CBC. No major role was contemplated for any independent Board of Broadcast Governors. The public and private sectors were to be formally recognized. The CBC should be served, so the Corporation argued, by a 15-man board, ten from English-speaking and five from French-speaking Canada. Private broadcasters also were to have a representative board known as the Private Broadcasting Authority [PBA]. Each board was to report directly to the Parliament

and report annually on their respective sectors. Even in terms of the allocation of channels the role of the independent agency was to be modified. The CBC urged that the Department of Transportation establish a Planning Committee to deal with the long-range use of broadcast channels and that CBC and the PBA be members thereof.

The CBC seemed to be saying that most of the industry's problems and opportunities could be handled by the industry. Except for regular reporting, and the most unusual kind of difficulties government was not needed. Certainly, no independent regulatory authority was needed. Consider, by way of example two other recommendations put forward by the CBC:

- That a permanent liaison Committee between the CBC and the Private Broadcasting Authority be established through legislation; to meet not less than four times annually; to deal with all matters of common interest and the exchange of relevant information conducive to the most effective operation of all broadcasting in the public interest; that membership comprise the Chief Executive, one part-time member and one other nominee from each group and that the Chairman rotate between meetings.
- That means be found whereby any differences in interpretation of legislation affecting broadcasting be submitted to the Department of Justice for an opinion by which all concerned would abide. [ibid.]

The ideal structure of regulation from CBC's viewpoint left no room for an independent agency to inject its opinions into the Corporation's operations, and especially into CBC programming. The broadcast operators were in the best position to determine how

to maximize the airwaves in the public interest. And, the public need not worry, for, after all, wasn't the CBC part of government; wasn't it a Crown Corporation?

What the CBC wanted it did not get. The Broadcasting Act of 1968 established an independent regulatory authority under Part I of that Act. ⁸ Yet, the CBC stated goals are not to be dismissed. They afford an opportunity to understand, to some extent, how the Corporation may react to that independent authority, the Canadian Radio-Television Commission [CRTC].

A sharp example of that reaction came only months after the Broadcasting Act of 1968 came into force. On December 18, 1968 by Public Announcement the CRTC ordered a hearing "into the circumstances surrounding the production and the broadcast" of the CBC programme entitled "Air of Death" telecast over the Corporation's network in October 22, 1967. More particularly, that which sparked the hearing was a one-hour documentary broadcast on the level of air pollution in the neighbourhood of a chemical plant at Dunnville, 30 miles south of Hamilton, Ontario. A provincial commission earlier had termed the programme "unwarranted, untruthful and irresponsible." It was after the Ontario report and "in view of the public concern" aroused by "Air of Death" that the CRTC hearing was held. [CRTC Public Announcement, December 18, 1968, at p. 1]

Agencies, however, cannot simply compel hearings. They must have authority. The CRTC stated its statutory base for action: The grounds, realistically, were in the alternative. Section 19(21)

of the Broadcasting Act allowed a public hearing by the CRTC if "it would be in the public interest to hold such a hearing in connection with . . . a complaint by a person with respect to any matter within the powers of the Commission." [Section 19(2)(c)] In addition, such a hearing may be required "in connection with any other matter in respect of which the Commission deems such a hearing to be desirable." [Section 19(3)]

For the CRTC, however, the hearing was not to be open-ended. Terms of reference were stated by reference again to the Broadcasting Act. The CRTC noted the language of Section 2 of that Act:

- "(c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;
- (d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources;

and that the objectives of the broadcasting policy for Canada enunciated in this section can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority." [Section 2(c)(d).]

The Corporation responded to the announced hearing by striking at the jurisdiction of the CRTC. [Statement By The Canadian Broadcasting Corporation To The Canadian Radio-Television Commission Concerning The Public Hearing To Be Held By The Commission]

In Connection With The Preparation, Production and Broadcasting Of
The CBC Television Program Entitled "Air of Death," Toronto, March
18, 1969] In the debate surrounding the programme itself the basic jurisdictional point made by the CBC seemed to be lost. Yet, it is worth restating here, for it contains the seed for controversy as the CRTC and the CBC grope their way toward understanding and a modus vivendi.

Essentially the CBC argued that no ad hoc inquiry into its programming is permitted under the Broadcasting Act. Indeed, Section 2(c) of that Act, cited in the CRTC public announcement calling the hearing declares the responsibility of licensees for programs they broadcast and their right to freedom of expression, together with the right of persons to receive such programs as "unquestioned" and "subject only to generally applicable statutes and regulations." The CBC brief stated:

This was also the situation in Canada prior to the coming into force of the new Broadcasting Act; in 1967, at the time the program was produced and broadcast, these responsibilities and these rights were only curtailed or conditioned, as is still the case, by the need for licencees to abide by the law of the land, be it criminal law, civil or common law, statutes of general application, conditions of licence, whatever restrictions may result from abiding by the regulations enacted by the Board of Broadcast Governors in the exercise of its jurisdiction and, finally, by a licensee's own views and policies relating to the manner in which it should discharge its responsibilities and duties to the public.
[Id. at pp. 11-12]

That is, the CBC argued, the CRTC can only control programming through rules of general application. There can be no public inquiry directed toward the merits of any particular program in the absence of a charge that a regulation or statute or

on the terms of license had been violated. For the CBC, or at least its highly regarded General Counsel, Jacques R. Alleyn, the rationale for this circumscription of agency authority was quite basic. In a letter to me [which for Committee purposes ought to be treated as confidential] dated July 29, 1969, Mr. Alleyn wrote: ". . . I personally had very strong feelings concerning the appropriateness for the C.R.T.C. to conduct an inquiry into the production of that program ["Air of Death"] in the wake of accusations made by the Hall Commission [the Ontario investigating group] concerning the alleged untruthfulness of some of the statements made in the course of the broadcast of the program. I believed that for the C.R.T.C. to hold a hearing in these circumstances could have the effect of indirectly curtailing the initiative of program producers even though they felt that they were preparing programs that met the requirements of law but which possibly could be put in question by the C.R.T.C. in the course of a hearing of the type that was held in connection with Air of Death. I was also concerned that indirectly the C.R.T.C., who has the authority to enact regulations, was more or less putting itself in a position where it would have to interpret its own regulations and apply the criteria from these regulations to the particular subject matter being the object of their inquiry. It is my belief that in our system there should be maintained a separation between the power to enact law or make regulations and the power to interpret and enforce these regulations. I felt that this separation could lose its edge as a consequence of the holding of this public hearing."

The only relevant CRTC regulation applicable to the "Air of Death" was Section 5(1) of the Radio (TV) Broadcasting Regulations of the BBG which, under the Act, were carried forward to the CRTC. [See, Section 62, Broadcasting Act of 1968] Section 5(1) provides, "No station or network shall broadcast . . . (d) any false or misleading news." The CBC argued, and, it seems under the Act, quite properly that it was not the province of the CRTC to try any violation of regulation. The Act provides in Section 29 that any licensee violating an agency regulation is guilty of an offence and on summary conviction is liable to a fine of \$25,000 for a first offence and \$50,000 for each subsequent violation. The trial of such a matter is for the courts, not the agency. [Finally, though it is not key to the principles stated by the CBC, the Corporation added that it was not within the power of the CRTC to judge a 1967 program in the context of the 1968 broadcasting policy of Canada.]

In its brief to the CRTC the CBC summarized its position:

[T]here is no doubt that the BBG had the power to enact regulations "respecting standards of programs" and that the CRTC can also exercise this power under the new Act; the CRTC, when enacting regulations respecting "standards of programs", may very well do so with a view to ensure the maintenance of what it considers to be "high standards of public information"; however, the determination that these regulations have been breached or have not been breached and that, as a consequence, "high standards of public information" have or have not been maintained by a licensee in any particular instance is, we submit, exclusively a matter within the jurisdiction of the courts. The separation which is usually maintained in Canada between the legislative and

the judiciary does not appear to have been set aside in our broadcasting legislation; the power to enact regulations rests with the CRTC and the power to interpret these regulations and adjudicate upon accusations of infringement in any particular case rests with the courts. [Id. at p. 14]

Yet, for all the argument, it is worth recalling what in fact occurred concerning the "Air of Death." Even in its brief submitted before the hearing the CBC indicated a willingness to aid in the conduct of the proceedings. Confidential interviews with CBC officials made clear the reasoning: The CBC was anxious for the public to know just how the "Air of Death" programme was shaped. Further, once the hearings were underway, it became plain that "Air of Death" was not on trial. CRTC Vice Chairman, Harry Boyle, head of inquiry, said: "We are not in a position to determine the 'truth' as to pollution. We are investigating the methods and techniques used in the search for such truth." [See, CBC Disputes Rights of Pollution Probe, Toronto Daily Star, March 18, 1969, p. 4, c. 7.] And, on the last day of hearing Mr. Boyle banned all reference to the "Air of Death." The inquiry, he said, was restricted to the expert commentary on the making of documentaries. [See, "Air of Death Inquiry Hears Producers," Toronto Daily Star, March 21, 1969, p. 9, c. 1.] In fact, it seemed, Mr. Alleyn and the CBC seemed to have won their point: The CRTC did not as such conduct a probe of the "Air of Death." It appeared that the agency was more concerned with its own role in promulgating regulations that would have general application. The effect of this position, if it is that of the CRTC, would leave programming the essential responsibility of the licensees. The CRTC's role would become that of rule-maker and not interpreter

[The CBC, however, did not forget its central point of dispute. See, Appendix B(4), concluding remarks of Mr. Alleyn.]

5. CONTROVERSIAL BROADCASTING: POLITICAL PROGRAMS--
AN EXAMPLE OF SPECIFIC CONTROL AND ITS LIMITATIONS

The subject of controversial broadcasting brings into sharp focus the stated public policy of the "right to freedom of expression and the right of persons to receive programs." Surely, aside from religious controversy, the legislature can be no more sensitive to subject matter than that relating to political broadcasting. And, it is here that first by regulation and later by statute that rules of general application set specific constraints on freedom of expression. Our purpose in developing this particular subject is to offer an example not only of control over program content but also the direction that Parliament took to achieve fairness.

The beginning point for understanding is the Aird Commission Report, supra. Under the topic, "politics," the Commission declared: "While we are of opinion that broadcasting of political matters should not be altogether banned, nevertheless, we consider that it should be very carefully restricted under arrangements mutually agreed upon by all political parties concerned."

[Aird Commission Report, supra, at p. 11.] The first Royal Commission on broadcasting did not want to encourage political programs. It wanted, on the whole, to discourage them without imposing an absolute ban. In sum, if there were to be political

programs the affected parties first should agree on time allocation.

The approach taken by the Aird Commission was accepted by Parliament, the CBC, then the BBG, later the CRTC, and codified in law by the national legislature. In 1939 the CBC set forth detailed guidelines for political broadcasting applicable to Federal elections. These were later expanded in 1944 to provincial contests.

[See, Annual Report of the Canadian Broadcasting Corporation for 1944, at p. 25]:

In accordance with the recommendation of the last Parliamentary Committee, the Corporation's policy of providing free network time for political broadcasting during Federal election campaigns was extended to the Provincial field, and it was first applied to the Ontario Election Campaign in the summer of 1943. Seven and one-quarter hours of free network time was made available to the three qualifying parties, the division of which was arranged between the parties themselves by mutual agreement. In addition to the free network broadcasts, time was made available on the Corporation's station CJBC, Toronto, for a limited number of free broadcasts for independent candidates contesting ridings in the Toronto area. The plan proved very satisfactory and has since been incorporated in the Corporation's statement of policy governing political and controversial broadcasting known as the "White Paper". Broadcasting arrangements in connection with the Ontario Election, including the scheduling of free network broadcasts and the maintenance of records of all political broadcasts released in connection with the election, were the responsibility of this Division.

The "White Paper", under the supervision and guidance of this Division, was revised and re-issued in February, 1944, in the light of experience gained since its original publication in 1939. The major change instituted was the provision for free network broadcasting by both federal and provincial political parties in the period between election campaigns. Under this plan, federal parties will receive two half-hours per month on a coast-to-coast network and provincial parties one half-hour per month on regional networks, the division of time between the parties to be in accordance with a fixed formula.

On December 18, 1961, with an effective date of January 1, 1962, the BBG issued Circular No. 51 titled, "Political and Controversial Broadcasting Policies." Section 11 of the then Broadcasting Act gave the BBG authority to make regulations concerning the amount of broadcast time that could be given to programs, advertisements, or announcements of "a partisan political character, and the assignment of such time on an equitable basis to all parties and rival candidates." Section 17 of the Act denied to a licensee the right (a) to broadcast a dramatization of a program, advertisement or announcement of a partisan political character; (b) to broadcast any program, advertisement, or announcement of a partisan political character from two days before any Federal, provincial, or municipal election. And, finally, the Act required disclosure on whose behalf any partisan political broadcast of the type permitted was made.

[Cf., Managed News, II, infra.]

The Broadcasting Act of 1968 includes all that was in the earlier Act as to political broadcasting, but also goes beyond it. Section 16 of the 1968 Act allows the CRTC, on recommendation of its Executive Committee, to make regulations concerning the time that may be devoted to political broadcasting as it was described above, and, in this regard, to insure time allocation on an equitable basis for political parties and candidates. [Section 16(a)(iii)] This same power extends to networks, and, therefore, would include the CBC. [Section 8 16(a)(v)]. The CRTC also is given the right to make rules concerning the definition of dramatization of political broadcasts. [Section 16(a)(iv)]

In promulgating any rules the Act in Section 28 sets some rather specific limitations on the CRTC. The news black-out was extended to cover referenda thereby covering in part the problem posed by government's action in the 1942 plebescite. [Section 28(1)(a)] Full disclosure of sponsor and political party was ordered for any political broadcast both before and after the program, including one of two minutes or less duration. [Section 28(2)(a)(b).]

Yet, in accordance with Section 62 of the 1968 Act, the CRTC adopted the earlier detailed statement of the BBG which is set forth in full in Appendix B-5-1. For our purposes a brief summary of those regulations will be given with a view toward demonstrating the option taken by government in favour of restriction over freedom to assure fairness. First, consider the agency's concern over dramatization, which, after all, is only a vehicle for communicating. The BBG and the CRTC took the policy view of banning "all political broadcasts incorporating any device which would be unnecessarily theatrical" [Circular No. 51, "Political and Controversial Broadcasting Policies," BBG and CRTC, Jan. 1, 1962, at p. 3] To achieve compliance with this standard the sponsoring party is required to accept responsibility for what is broadcast. Controls are exercised not only in terms of program participants, who, for example, must appear in their own identity. [Id., III(1)(a), at p. 4] This might mean that an actor could not read the speech of a candidate. If so, this contrasts rather sharply with the use made of Hollywood by both the Republican and Democratic parties in the United States. It also implies that a candidate who simply is not able to work with television as a medium is put at a competitive disadvantage over his rival.

Controls also extend to the use of visual materials. The static kind, such as maps and charts, are permitted. The action sort, like movies, are sanctioned if they depict "real events, including the normal activities of a candidate engaged in an election"

[Id., III (b)(c), at p. 4]

Of perhaps greater import than program control through dramatization limitations is that imposed in the allocation of time. The BBG and then the CRTC made the flat statement that no network operator was under an obligation to allocate free time for political broadcast. [Id., IV at p. 4] But, "if the network is not providing free time for political broadcasts, it must be prepared to sell time on the request of the parties." [Id., V (1)(b), at p. 5] The network may decide the maximum time it will sell, and then distribute it, on agreement with the parties, "on an equitable basis." [Ibid.] "Failing agreement between the parties, the network operator must file with the [CRTC] a statement of the amount of time which is offered to each party." [Ibid.]

To resolve the problem of parties which have not achieved national stature in a national election the agency has imposed on the networks the obligation of establishing subsidiary hookups within a province or other appropriate geographical area. [Id. V (1)(c)] This, again, meets part of the problem posed by the 1942 plebescite where the opposition was organized within Quebec, and found expression in a League. It does not answer the question posed by organized groups which may not have the dimension of a party. What would the CRTC position be in either a national or provincial election to a demand by groups of Indians to speak in opposition to particular

candidates or party programs?

In the 1961 Parliamentary Hearings, supra, there came an opportunity to test the meaning of the then newly established BBG regulations and find answers to the questions posed. Before, however, going to the hearings it is necessary to refer to the second portion of BBG Circular No. 51, namely, that touching controversial broadcasting. The agency's statement, compared to that on political broadcasting, was quite short. It covered only two pages. The BBG began with a firm statement of freedom of expression:

The Board does not exercise censorship. It does not restrict the nature of material to be broadcast, except that such material must conform with its printed regulations.

The policy of the Board, with regard to controversial broadcasting, is based on the following principles:

1. The air belongs to the people, who are entitled to hear the principal points of view on all questions of importance.
2. The air must not fall under the control of any individual or groups influenced by reason of their wealth or special position.
3. The right to answer is inherent in the doctrine of free speech.
4. The full interchange of opinion is one of the principal safeguards of free institutions.
[Id. Part II (i)]

The BBG then made an equally firm decision. As a necessary corollary to freedom of expression there should be no sale of network time for the broadcast of opinion or propaganda.

Non-commercial organizations interested in public affairs were allowed to purchase time on "subsidiary hookups or individual stations with the prior approval of the BEG. [Id. Part II (I) (2)]

What the BBC seemed to be moving toward was a fairness doctrine. That is, it seemed to be saying: Let there be full and free discussion of controversial issues. And, if any one group or individual is criticized let there be the right to reply. This is not expressly stated in the regulations; it must be inferred. The rules are general only. They declare:

In accordance with its policy of resisting any attempts to regiment opinion or to abuse freedom of speech, the Board lays down no specific rulings covering controversial broadcasting. The Board itself supports the policy of the fullest use of the air for:

- (a) Forthright discussion of all controversial questions;
- (b) Equal and fair presentation of all main points of view;
- (c) The discussion of current affairs and problems by informed authoritative and competent speakers.

Broadcasting is a changing and evolving art and no fixed and permanent criteria can be set down for the best method of presenting controversial material.

These policies have been adopted in an effort to ensure that the medium of broadcasting may remain at the disposal of the nation, regardless of party, section, class or religion.

The interlock between political and controversial broadcasting is obvious. And the right of reply was one that very much

concerned the Parliament in 1961. Mr. Pickersgill and Mr. McGrath questioning Dr. Stewart, then Chairman of the BBG, elicited the problems and some of the potential in the BBG regulations. Would, for example, the Communist or Nazi parties have the right of reply? And, it might be asked, if Professor Melville Watkins and others established their own party would they have the right to national reply? Read now the testimony of Dr. Stewart:

Dr. Stewart: . . .

But during a provincial affairs broadcast one of the other parties in their broadcast took time out to criticize the Social Credit Party in Manitoba. Whereupon, we had a complaint from the Social Credit people along this particular point, and we ruled on this that if a party was not given time, and if other parties in their broadcasts criticized the party which did not have time, then the party which did not have time must have the right to reply, because the right to reply is inherent in all of the principles governing both controversial and political broadcasts.

So, if a party is given time, and it takes time to criticize another party which has not got time, then that party must have, in our view, the right to reply.

Mr. Pickersgill: I wonder if Dr. Stewart would define "party" in this context and as used here? This is a very, very far-reaching ruling, and I would be greatly interested to know if anybody chooses to call himself a political party--such as a gentleman did once on the radio, a gentleman from Sorel the other day--if that makes him a political party; and if I should attack him on the radio, does he have the right to reply?

Does the communist party, which, so far as I know, has no members in any elected legislature in Canada, have the right to reply under that ruling?

Dr. Stewart: The ruling has reference to controversial broadcasts of which, perhaps, political broadcasts form a part. I think, however, that a controversial broadcast is wider than this.

We take the position that if any group of people are referred to detrimentally in a broadcast, then they have the right to reply, and it does not matter whether they are a political party or some other group. This is the essential principle; the right to reply in a controversial broadcast.

Mr. Pickersgill: No matter how small that minority may be?

Dr. Stewart: No, I would not say no matter how small the minority might be. But if the reference was libelous or slanderous, we would say this has nothing to do with us, and there are normal procedures to be followed.

Mr. McGrath: Let me use an extreme example. Let us suppose the nazi party should enter a candidate in every constituency. Then under this present regulation they could claim an amount of time equal to every other political party?

Dr. Stewart: I believe so.

Mr. McGrath: I mean a proportionate amount of time.

Dr. Stewart: Yes. [1961 Parliamentary Hearings, supra, at pp. 68-69]

Dr. Stewart had no difficulty handling "partisan political" broadcasts where one party commented on another. He had, however, considerable difficulty in the more meaningful day-to-day public affairs broadcasting where a program might have a "political slant." As to this subject just where did the right of reply come into play. First, Dr. Stewart carefully defined the statute relating to political broadcasts:

Mr. M.J.A. LAMBERT (Parliamentary Secretary to the Minister of National Revenue): I wonder if the chairman would like to make some observations on something which has come to me in many instances, and that is due to an interpretation of the individual viewer who says: well, such and

such a program has a much greater political slant than a dramatic viewpoint; in other words that a program has a very potent political message in the sense of a political philosophy that is being put forward. Those are the ones concerning which I know that I get spoken to and written to, when the people raise this particular section, and say: well, this is nothing but a disguised political dramatization.

Dr. STEWART: This section, of course, deals with partisan political programs which presumably involve the participation of political parties.

Now, this is a somewhat different situation from a program which may reflect a philosophy, although it may be a philosophy which is more normally identified with one political party than with another. But I think there are many programs which in a particular sense involve a political philosophy but which are not necessarily partisan political broadcasts.

Mr. LAMBERT: No, but you would also agree that it would take about the intelligence or knowledge of a ten-year-old to tie the two together, the connection between a political party and the philosophy that is being expounded.

Dr. STEWART: In some cases I think that would be possible, but in other cases perhaps it would not be so likely.

Mr. SMITH (Simcoe North): . . .

But to get out of the realm of the present controversy, we could go back for several years to a C.B.C. program, in the days of radio. It was, I think Joe Hill, who was a labour union man. There was a great deal of controversy about it. It was not sponsored by a political party, but it was a dramatic program, partly fictionalized, and it certainly was a program of a partisan political character. Yet it had no connection to any political party.

Does the board or do the stations interpret this section as relating only to programs that are sponsored by an identifiable political body?

Dr. STEWART: Yes, I think so far as this section is concerned that we do. Now, there are other principles governing political and controversial broadcasting which apply to other types of programming. But I think it is correct to say that as far as section 17 is concerned, it is the sponsored political program which we have in mind here. [Id. at p. 353]

Next, as an administrator Dr. Stewart asked what his responsibilities were under the Act once partisan political broadcasts were put aside. At issue before the Parliamentary Committee was a CBC program depicting a Nazi party in Montreal. It left, according to some of the Members, the impression that the Nazi party had roots in Canada when it did not. Here is a portion of the relevant testimony:

Dr. STEWART: Well, under section 11, generally, and the ones referring to programs; I think we have enough wide powers under the general section 10 and the specific section 11 to justify the general principles which are set out in the so-called white paper, referring to controversial political broadcasts. These are not regulations, they are statements of policy.

Mr. HORNER (Acadia): My question follows up those of Mr. Baldwin's, about the penalty, and to whom it shall apply. I can think of one particular situation which comes to mind, where I think the C.B.C. might have violated this act. It was, in a sense, a dramatized program concerning the nazi party in Montreal. I think it was contrived for the purpose of misleading the public into believing that there was an organization which had a foundation in Canada, and had a movement.

I wonder if it would not be better applied if it were confined under this section, rather than taking away its licence. I realize it would be difficult, and perhaps not be desirable to take a licence away from the C.B.C. So maybe a fine would be in order, and easier to apply.

Dr. STEWART: It is a problem as to how to penalize people who break this regulation. The problem is unquestionably a very difficult one in the case of

documentaries and clinical analyses of social problems. In those areas the problem becomes extremely difficult, and the line of demarcation between the purely factual presentation and the element of dramatization, which undoubtedly the producer likes to inject in terms of the dramatic effect into his program. Here I am back at the distinction: is it dramatized, or are you looking at the effect of the thing.

I think this is the real problem, rather than of how to proceed when you penalize people who breach the regulations. I think that the nature of the breach might differ in particular cases, and if it could be shown that it was deliberate, it would be a different situation; it would differ from the situation in which you at least cannot establish that there has been a deliberate and flagrant breach of the regulations.

Mr. HORNER (Acadia): In this particular program, the C.B.C. did not have to bother to portray the nazi party in Canada at all. They could have left the door unopened, shall I say. It was a deliberate action on their part, in my interpretation.

However, I accept your definition of dramatization. I think it is a very good one. But this was deliberate on the part of the C.B.C. and was contrived for the purpose of trying to convince the public that this party had a definite foundation in Canada. But it was proven by the authorities, after the program, that this was more or less a big balloon which popped up in the air for no reason at all, and that there was no foundation to the party in Canada to any extent, or at least to the extent it was portrayed in the film.

Dr. STEWART: I think, having made the decision--let me put it this way--that the broadcaster is going into a program on such a matter as this, that is one thing. Now, is it significant, or is it not? Is it worth while doing, or is it because of a decision which has to be made? But if it is the decision that it is of interest to the public that something should be done, and if you are then confronted at the same time with the problem of the degree of restraint with which this is done in terms of the reality of the situation, then how far is the producer, who is

basically an artist, trying to operate effectively in an artistic way to produce a dramatic impact in the story that he is trying to tell? It seems to me that this is the problem.

Mr. HORNER (Acadia): That is true; but definitely this was a political program of a partisan nature. An artist would certainly try to control his emotions in order to put on a non-dramatized program at least, if he thought it was necessary to put it on at all. [Id. at p. 355; see, also, pp. 356-59]

Primary responsibility in the area of controversial broadcasting, according to Dr. Stewart, was to be left to the broadcaster. Such a position comports even today with the Act. But, what controls does the broadcaster exercise to bring fairness, objectivity. Surely, a place to look is the CBC, which remains the dominant national network by law, and, for a time, stood as the designated regulator of broadcasting. What control does the CBC exert by rules? We already have seen the control it exerts over its personnel through hiring, promotion, and lay-off.

Regulations covering political broadcasts by the CBC are far more extensive than those promulgated by the BBG. And, even as to the CBC White Paper [See, Appendix B-5-2] the Corporation has stated its rules as minimum criteria: "The CBC, both in political and in other controversial matters of public interest and concern, has always taken the view that in holding a broadcasting license the station assumes wider general responsibilities than those specifically required by these regulations . . . The responsibilities include fair opportunity for the presentation of the principal points of view on issues of public interest or concern." [Id. at p. 1]

By action the CBC has attempted to give its own meaningful interpretation to fairness in political broadcasting. On February 17, 1961 the Corporation reacted to criticism voiced in Parliament. The Manitoba Social Credit Party was not represented in the current CBC series of "Provincial Affairs" broadcasts in that province. It did not run candidates in the 1959 election; but it subsequently elected a member as a result of a by-election. During one of the "Provincial Affairs" broadcasts, the premier of the province, the Honourable Duff Roblin, made a reference to the kind of criticism he was getting from various parties, including the Social Credit League. The President of the Manitoba Social Credit League maintained in a representation to the B.B.G. that they should be given time to state their views, since they were not represented in the CBC series, "Provincial Affairs."

In a letter to R. J. Kerr, CBC Coordinator of Station Relations, the B.B.G. Counsel, Mr. Pearson, wrote:

The Board is of the opinion that, where a party in a free time broadcast comments on the platform or policy of a party which has not been allocated any free time, the latter party should have the right to reply to the former. This is based on the reasoning that if a political party is large enough to be deemed worthy of the comments of its opponents, surely it is large enough to have the right to reply to this opponent.

I realize that this will make administration of this Regulation increasingly difficult for the Corporation, but then politics is a very difficult subject at the best of times.

In a confidential circular to its staff titled, "Programming: Policies and Procedures - Political Broadcasts and the Right to Reply,"

the CBC stated: "This information has been circulated among public affairs supervisors and producers, but it is something that we should all be aware of. In fact, parties participating in "The Nation's Business" and "Provincial Affairs" series should probably be told that if they criticize a party which does not normally have a chance to reply within the series, the series might have to be interrupted or extended to permit such a reply to be made."

To achieve fairness, in the mind of CBC management, restraint had to be imposed. A program, itself, could be interrupted or expanded to give the immediate right of reply. Similarly, CBC informed its staff it is the Corporation's "policy that broadcast appearances by candidates or potential candidates are controlled so that no candidate may gain an advantage over his opponents by unrestricted broadcast appearances." [CBC Programming: Policy & Procedure--Broadcast Appearances by Political Candidates, Oct. 1, 1965 (Confidential from D. L. Bennett, CBC Director, Program Policy)]

The nature of that restriction was to confine appearances of candidates to particular programs such as news, public affairs, and free-time election broadcasts, except where the CBC "Department of Public Affairs has given explicit agreement to appearances on other types of programs --for example, a farm broadcast which might deal with the farm issues in the campaign . . . The essential point is that all such appearances must be under central supervision in each area."

[ibid.]

Evidently, CBC understands the importance of the broadcasting media. The Corporation seems to assume that the media can be employed to

manipulate the public. This applies not only to the form, that is, to the use of dramatization and music, but also to broadcasting personalities who, through constant exposure, are deemed to have certain advantages if they move into the world of politics.

Accordingly, the CBC declared:

"Particular attention is directed to the possibility that well known broadcast personalities (including commercial announcers) may be chosen as candidates in an election. Such candidates will be required to withdraw from their regular program or commercial assignments with the CBC for the duration of the election campaign, except that a commercial announcer may continue to appear in announcements which are not seen or heard in his constituency.
[ibid.]

The CBC has taken the posture of strict neutrality in matters relating to political broadcasts. And, that neutrality affects the Corporation in its normal operations. Take, by way of example, prediction of election results. Few could question that this is news. Yet, how far should a broadcaster allow its news department to proceed in predicting results? Could such activity have an effect on an election itself? The CBC has sensed this danger while it articulates the news value of predictions. In another confidential memorandum to its employees CBC tried walk the path of a neutral. [CBC Programming: Policy and Procedure--The Prediction of Election Results, April 14, 1966 (Confidential from D. L. Bennett, CBC Director, Program Policy)]

During the last two Federal Election campaigns forecasts of the election results were a common feature of the press, radio and television. In its election programs the CBC provided the listening and viewing audience with the results of the Gallup poll (popular vote and number

of seats) and with estimates which reflected the views of observers in the various parts of the country, e.g., newspaper editors, party officials, candidates, election experts, etc.

In the wrap up election broadcasts just prior to voting day it has been a practice to present last minute reports from each main part of Canada by the CBC reporting teams covering the campaign. These reports include an assessment of the prospects of the different parties, the number of seats they might expect to win, lose or hold. Many qualifications are normally introduced into these regional reports by the men in the field.

Such end-of-the-campaign reports are a legitimate form of journalism. However, there is a danger in summarizing the results of these reports in tabular or graphic form which excludes the important qualifying remarks or interpretative observations of the reporter. The "guesstimates" presented in columns of specific numbers may appear to be the results of a comprehensive survey or poll of voter opinion. Such a presentation may well mislead the audience as to the nature and reliability of such predictions.

Therefore, CBC election programs should not summarize reporter estimates of voting results in tabular form. A verbal description of the situation, including high and low estimates, together with the relevant precautionary remarks, is acceptable.

To conclude this section it must be emphasized that the CBC has opted for a particular kind of neutrality. It, as an entity, has chosen to set the rules for fairness. The Corporation, without exception in any election, has refused to sell advertising time to opposing parties. CBC could have chosen the easier, more simplistic task, of allocating purchase time to contending factions. As a matter of policy it has chosen not to do so. [See, CBC Programming: Policies and Procedures--Provision of Free Local Time for Political Broadcasts, Oct. 18, 1965 (Confidential from D.L. Bennett, CBC Director of Program Policy)]. Not only must the Corporation allocate free time, it must

insure its fair apportionment; control its use; and regulate other network programming so that only the free time allowed is used for political broadcasts. The difficulties for the CBC as the nation's national network while far greater than local broadcasters are much the same. And, in the final analysis, the CRTC, as did the BBG, must play a role. A verbatim view of these problems was presented in the 1961 Parliamentary Hearings. Some highly informative correspondence printed in the Hearings record is attached as Appendix B-5-3.

6. CONTROVERSIAL BROADCASTING: THE CBC AND CONTROVERSIAL PROGRAMS--RULES.

The subject matter of political broadcasting extends beyond election contests. It relates to the daily life not only of the politicians, but also the citizenry. Illustration will demonstrate the point. Take pollution of the environment whether it be water or air, sight or sound. The issues as to whether there is pollution, and, if so, what should be done about it, not only are controversial, they also become political to the extent that the state is called upon to act. In such matters the formal rules governing elections are not applicable. The question is, however, whether the principle upon which broadcasters are to act is applicable. Again, beginning with the CBC for the reasons stated in the last section, the status of neutrality will be explored using the CBC's own policy statements.

E. S. Hallman, CBC Vice-President--Programming, in a memorandum dated January 20, 1961, reaffirmed the Corporation's

refusal to accept sponsorship in six enumerated types of programs

[CBC Programming: Policy and Procedures--Sponsorship of Opinion

Broadcasting (Confidential)]:

- (1) News programs.
- (2) Public affairs forums, discussions or commentaries.
- (3) Talks or interview programs in which the full expression of controversial opinions may occur.
- (4) Programs dealing with consumer information or advice, including farm broadcasts.
- (5) Documentaries and dramatized documentaries dealing with social, political, economic or human relations questions in which contentious views or opinions may be explored.
- (6) Religious and certain institutional broadcasts.

The rationale for CBC's position was fully stated in another memorandum from Bernard Trotter, CBC Supervisor of Public Affairs, titled, "Proposed Review of CBC Policy re Sponsorship of Controversial Programs," December, 1960. Mr. Trotter stated his own reasoning which later was adopted by the Corporation. He did this not in terms of abstractions, but in the context of a hard proposal of opening a network public affairs program, "Close-Up," to sponsorship. He set out the argument of those within the Corporation favouring the proposal:

The Corporation needs revenue to meet the competition from private Canadian TV stations. Sponsors, watching the increase of public affairs programming in the United States, had developed heightened interest in aiding such efforts in Canada. Some of these sponsors had

become sophisticated enough to understand that the dangers to them of being associated with controversy might have been exaggerated. As a result they may be willing to accept sponsorship on the condition of an absolute absence of any foreknowledge or control of program content.

Mr. Trotter answered the argument:

"(1) Two thirds of the Corporation's revenue continues to come from public funds. Apart from all other considerations, it is surely important for most of our so-called 'public service' programming (news, public affairs, religious, etc., which provide the main justification for the CBC in the minds of many influential persons) to remain visibly dependent on public funds. Otherwise we are in danger of creating the impression that an entirely commercial operation could do everything we do, without public money.

"(2) It is no doubt true that the American example in the last year has made the sponsorship of public affairs programs more fashionable in advertising circles than it was for a number of years. This trend in the United States is partly the result of the criticism which television networks have been subjected to, beginning with the quiz show scandals. On the other hand, it may also be partly attributable to the search of the American advertiser for something new into which to put his money and partly to a freer intellectual climate stimulated by the Khrushchev visit to the U.S. a year ago and the Presidential campaign. There are fashions in television programs, as in films, music and theatre, and we cannot assume that more and more money will go into public affairs programming in the United States.

Nor can we assume that the present level will be maintained. In other words, we would be wrong, I think, to allow Canadian advertisers to jump on the public affairs bandwagon, for what might turn out to be an embarrassingky short ride. Our public affairs programs are part of the basic service we owe to the Canadian people. We cannot, in my opinion, allow an important part of our programming in this area to become directly dependent on advertiser interest.

"(3) Some sponsors may, indeed, be sophisticated enough to buy a controversial program like a pig in a poke and sign a contract in which they forswear any interest in the content or any contact with the producer or other program officials. It was suggested, for instance, that the acid test would be for a cigarette manufacturer to accept the possibility of sponsoring a "Close-Up" study of lung cancer. It was also, I think, suggested that the agency concerned had passed this test by agreeing that if the Corporation felt that such a program should be done, they would have no objection. It seems to me that we need to be rather sophisticated in assessing our real position if we were to contract with any sponsor for a program like "Close-Up." The sponsor would not need to be in touch with us. He would be very much on our minds in one way and another. First of all, we would be extremely unlikely to tackle any subject which we knew would give offence to the sponsor and/or his shareholders. It is simply bad manners to take someone's money and then deliberately slap him in the face. I don't think we

would do this, and if we did I think the sponsor would cancel at the earliest opportunity and would be completely justified in cancelling. But in a more subtle and all-pervading way, the existence of a sponsor would complicate our discussions about potential program material for a program like "Close-Up." It seems to me that our deliberations are often tortured enough without adding another incalculable factor. Even if the sponsor kept his part of the bargain and refrained from direct contact with the producer or program officials, the sponsor's agency would certainly be in constant touch with the CBC commercial department and the sponsor's view of the way the program was going would, inevitably, filter through. In summary, I think we would be naive to believe that we could carry on the planning and production of "Close-Up" as we have done for the past three years.

"(4) Now I will add some of the more general considerations which I have in mind in recommending against a change of policy:

(a) No matter how carefully the taste of commercials produced for "Close-Up" were controlled, there would be occasions when any commercials at all would be in bad taste, e.g. documentaries on the refugees or the Calcutta slums. (A very good example of commercials offending taste by their very presence occurred Saturday night when CBS presented a program about refugees entitled "Rescue," sponsored by Philip Morris. The commercials were fairly low key, but even so the proud descriptions of "Vacuum Cleaned" tobaccos and Alpine as the winner of the new brand race, in juxtaposition with the program content

provided a more savage commentary on the values of North American society than I hope ever to see on the CBC).

(b) Some persons we might wish to include in the program would not be available to us if the programs were sponsored. (Judges, some lawyers, doctors, clergy).

(c) Talent costs for "Close-Up" are not by any means low, but there would certainly be some increase if the program were sponsored. Similarly, film material from commercial sources would usually be more expensive.

(d) We would have to accept the fact that opening "Close-Up" to sponsorship would make all other public affairs and news programs also available for sponsorship on the same basis. It would, however, be exceedingly difficult to define the basis of complete non-sponsor involvement and non-control in such a way as to make it stick all across the country in regional and local programming. The present policy, which looks clear enough, is too often misunderstood for me to have any confidence at all that a revised and more complicated policy would be understood sufficiently well for it to be interpreted accurately and successfully applied.

"I would be opposed to the sponsorship of controversial and opinion programs under any circumstances, as a matter of policy. Aside altogether from matters of principle, I think it would be foolish to jeopardize the Corporation's esteemed position in the eyes of many Canadians for what could turn out to be a rather small financial return in the long run. If, on the other hand, the sponsorship of "Close-Up" opened the way to sponsorship, say of the news and

other public service programs, then the Corporation would have taken, in my view, a long step towards its own destruction."

CBC wanted to place itself in the position where as an entity it would have a free hand in developing controversial programs. CBC did not want even the possibility of the Canadian public drawing an inference of control over such programming by commercial interests. In substance, the CBC placed itself in the same conceptual position, for certain purposes, as it assumed in the area of political broadcasting. Holding absolute power over controversial programming the CBC became that much more accountable in assuring fair, balanced presentation. Yet, fairness dispensed from such a position might tend to make the CBC rigid in the flexibility and creativity allowed its staff.

A measure of that rigidity became clear in the CBC policy statements issued between 1962-1967. The Corporation developed its policy in the light of specific program problems:

(a) Entertainment: Quiz Shows Based Upon News Events.

In 1962 two popular entertainment programs, "Front Page Challenge," and "Edition spéciale" centered on the identification of headline events or personalities of a few years before. Designed as entertainment, the programs and their panels were not intended to supplant CBC public affairs programming. For that reason the entertainment quiz panels did not represent different points of view, or, for that matter, were even expert on the subject under discussion. Yet, the nature of the program, viewer interest, demanded questioning by the panel of guests in terms of their role in important events. How

was CBC, in this context, to assure impartial handling of controversy and representation of conflicting views? The Corporation reacted by controlling and placing tight restrictions on the programs that would limit controversy to bring about fairness. Vice-President of CBC Programming, E. S. Hallman wrote [CBC Policy and Procedure Re Quiz Shows Based Upon News Events--"Front Page Challenge" and "Edition Speciale," Feb. 5, 1962 (confidential memorandum from Mr. Hallman)]:

1. The head of Public Affairs was to be consulted each week concerning guests and program content.
2. Current controversies are best handled by public affairs programming, rather than entertainment.
3. Some individuals may not be "suitable" as guests. An example given was war criminals.
4. The quiz programs should avoid frequent invitations to a given guest or individuals who represent a cause with which that person is identified.
5. The public affairs department should be consulted so that where the subjects to be discussed on the quiz programs are somewhat "involved" or of a "specialized nature" there can be adequate preparation.
6. Guests who though questioned as to the past may have an impact on current controversy such as an election should be avoided.
7. Where dispute develops between the public affairs department and the variety department concerning

these rules, the network program director must resolve the issue.

(b) The Handling of Satire. Four years after its rulings on quiz programs CBC dealt with the more serious, albeit general problem of satire. The Corporation referred itself to Webster's Dictionary and found satire defined as "(1) a work holding up human vices, follies, etc. to ridicule or scorn; (2) trenchant wit, irony or sarcasm used for the purpose of exposing and discrediting vice or folly." The CBC accordingly recognized the obvious: Quiz programs were purely entertainment. Thus, it was not inappropriate to limit such shows to entertainment and assign any significant controversial subject or person to public affairs. But the same could not be said of satire. For this is entertainment whose substance is controversial matters. Further, satire as a form is no recent invention. It has been a feature of the media for a very long time. Said the Corporation [Programming: Policy and Procedures--The Handling of Satire, Jan. 3, 1966 (confidential, memorandum from D. L. Bennett, Director, CBC Program Policy)]:

The Macpherson cartoon, the Max Ferguson, Wayne & Shuster, Eric Nicol sketch, the radio programs of Tommy Tweed, the columns of Art Buchwald, the earliest radio shows of Will Rogers, the current radio shows of Miville Couture, and even the pages of Punch, illustrate a tiny fraction of the many forms of satirical comment with which the public has become familiar. The television medium has naturally adapted the satiric form to its own purpose. Apart from satirical dramatic productions, satire may characterize an entire series such as the late night show, "Night Cap"

or "Les Couche-tard," or a whole program within a series, e.g., the Ottawa produced election satire on "Public Eye," or it may be inserted in the form of items within a magazine show, e.g., "This Hour Has Seven Days" or "Aujourd'hui."

In almost every case the success of satire depends on revealing the ridiculous or the contradictory aspects of situations and human behaviour in a way which provokes wry amusement or laughter. Satire can be amiable or it can be savage, and perhaps the most savage example many can recall is the one put forward by Jonathan Swift in his essay, "A Modest Proposal" to deal with the Irish famine.

Satire is almost always painful to the people exposed to satirical treatment and often painful or offensive to the people who sympathize with its victims. Politicians and public figures tend to be the most frequently satirized personalities of our time, and these people are exposed to satire and often ridicule from a variety of different sources. Public men, whenever they are engaged in public controversy, become easy targets for satire.

Satire is often used to puncture the pretensions of people in places of power to deal with hypocrisy and to lay bare social injustice when the normal methods of attack are ineffective. Thus, satire serves an important and useful purpose in the public media of communication.

For the CBC there was no policy that could prescribe how to be successful in satire. Nor was there any policy that could alleviate the hurt, offense or annoyance that satire might cause. But, for the CBC "one principle seems clear: the risks of dealing satirically with subjects, institutions, symbols or people about which large numbers of the audience are emotionally or sentimentally involved are high indeed." [ibid] High for whom? For the network? For those producing the show? For the viewers who are hurt? Perhaps some of the answers may come from the comments covering satire as stated by the CBC:

1. The Corporation is concerned about audience response.
2. Where the subject dealt with touches upon "intense personal feelings" programs should avoid mixing satire with serious comment. "More often than not the public seems to be confused by this approach [the mix] or it reacts strongly and negatively to the satirical treatment of an issue which they expect to be treated with dignity, intelligence and care." [Ibid.]
3. Accordingly, satire should be used most sparingly in programs whose main purpose is thoughtful consideration of important issues.
4. Any satire should not be inconsistent with established facts.
5. Whenever there is doubt as to the relevance or appropriateness of a piece of satire, "the wise course is to reject it as an element in the program." [ibid.]
6. In any event, satire should not depend for its effect in the ridicule of physical handicaps, race, colour or religion. The exceptions, such as Jewish, Scottish, and Irish humour, ought not be used as a base for unwarranted expansion.

These rules help to explain the rise and demise of CBC programs such as This Hour Has Seven Days. At its inception CBC could boast of the controversy which its satire and serious comment could generate; each week in 1964-1965 more than two million Canadians viewed the show. [CBC Annual Report for 1964-1965 at pp. 32-33.] Consider the Corporation's own evaluation of This Hour and a similar show Le Sel de la semaine [CBC Annual Report for 1965-1966 at p. 33]:

The public affairs programs This Hour Has Seven Days and Le Sel de la semaine also present idea and opinion about current events, but they do so using techniques that include comedy, music and satire. This, combined with their fast-moving format and their controversial content, attracts very large audiences who greatly enjoy the programs. On the other hand, Seven Days has drawn criticism, for instance that by using entertainment techniques it has allegedly lowered standards of analysis and good taste, thereby "pandering to the masses." Yet CBC audience research has shown that these audiences watch the program critically, rejecting some items, enjoying most. Furthermore, the program does not appeal solely or mainly to lower educational groups: special studies show that an abnormally high proportion (over 40%) of the audiences have completed high school, which is among the highest percentage for any CBC television program. Again, one segment of Seven Days, Summer in Mississippi, has won seven international awards.

It was only in the next annual report of the CBC that the series was effectively emasculated through change in the program's hosts. Once these individuals were removed the "key" staff personnel either left the CBC or drifted to other jobs. The program was eliminated. Reasons given by the Corporation were stated in the annual report. [CBC Annual Report for 1966-1967 at p. 54]. They merely summarize much that already has been written: "Basic to the controversy was management's judgment that the program, though lively and provocative, had come into conflict with Corporation policies and responsibilities in public affairs programming; had used journalistic methods which the Corporation could not permit; had exceeded the degree of authority the Corporation was prepared to grant programs of this nature; and had provided a continuing challenge to essential supervision, culminating in the unprecedented behavior of its principals in publicly disputing with the Corporation."

c. General Questions of Good Taste. Not unrelated to the problem of satire is that of good taste. What can be freely and

dispassionately discussed in mixed company in a faculty room of a university may well be considered outrageous in other circles. For the CBC, capable of reaching throughout Canada most Canadians, there is the decision as to whether some of its general audience should be offended by what otherwise might constitute proper discussion. And that decision is difficult to reach in view of the CBC's mission "to create and maintain an informed public who may hold a variety of lawful tastes, sentiments and attitudes."

Like its treatment of satire the CBC issued a four-page statement on January 3, 1967 concerning good taste. It is attached to this paper as Appendix B-6-(c). The basic approach of the Corporation is the same as with satire: Good taste is a delicate matter. No clear rules can be formulated because values not only are unclear, but they change. However, a breach of good taste can not only be dangerous, but disastrous. Thus, it is better to err on the side of caution if doubt should arise. And, to bring the requisite measure of safety, the Corporation relies upon its staff, and more precisely, upon leadership and reasonable discipline. "It is the responsibility of Network Supervisors to select and appoint producers and supervising producers in whose good taste and judgment they have confidence, to watch performance, and in cases where their confidence has been misplaced, to see that the person concerned is moved to another and less potentially dangerous or sensitive field. Producers, whether in Toronto or Montreal, or in regional production centres, must keep in close contact with their Program Directors and their Network Supervisor, and be ready to discuss with them any program

about which the slightest doubt may exist in their minds."

[Programming: Policy and Procedure--General Questions of Good Taste, Jan. 3, 1967 (confidential memorandum from D. L. Bennett, Director, CBC Program Policy)]

d. Public Affairs Programming. Seeking fairness, concerned about controversy, it was understandable for the CBC to place substantial responsibility in handling such matters in its public affairs department. Once this was done the Corporation acted to establish procedures that would give all the appearance of impartiality. First, however, came the statement of goals:

- (1) To provide information to the Canadian public about a large number of topics, some of them of current interest, some of them of more lasting importance.
- (2) To present a variety of viewpoints about those topics on which there is some difference of opinion, either internationally or within the Canadian community.
- (3) To present, fairly, the main points of view.
- (4) To facilitate the exchange of information and viewpoints between different sections of Canada.
- (5) To interest a larger number of Canadians in current affairs and in subject areas which might otherwise be outside the range of their experience, and to do this in as entertaining a manner as possible. [CBC Programming: Policy

and Procedures--Public Affairs Programming: The Host and Program Personalities, Sept. 13, 1965
(confidential memorandum from D. L. Bennett, Director, CBC Program Policy)]

The primary standards which must govern public affairs programs and those who participate in them are already familiar. But they were codified by the Corporation.

1. Information given should be accurate and reliable and based on an adequate factual background.
2. It is the duty of the CBC program planners to make sure that there is the necessary variety of informed opinions within a program series or throughout the broadcasting service as a whole.
3. In all presentations, producers are required to observe the canons of good taste. [ibid.]

The effective development of public affairs programs, attracting the viewing audience, tended to result in the emergence of broadcast personalities. The news "announcer," the impartial, bland host, became the participating, the moving news or host commentator. The CBC categorized the new breed:

- (1) The Participating Host - This is the figure seen from week to week, introducing the program, leading the audience from item to item, sometimes conducting interviews and sometimes expressing opinions current in the public mind about the questions or issues

being presented. The Participating Hosts in CBC broadcasting impart a personal tone and style to the programs in which they appear, but they should not express personal opinions on the issues under discussion.

(2) The Permanent Program Personality - This is usually a person of some standing or reputation in his own right, established from such professions as journalism, academic life or politics, who handles the presentation of a particular item or several items in a number of different contexts. Such a permanent program personality may conduct interviews or express views current in the public mind, some of which may be provocative. The success of such program personalities will depend on their ability to stimulate audience interest in the subjects at hand and their capacity to demonstrate the importance, urgency or high interest of a particular subject or situation. A permanent program personality will, therefore, project a considerable degree of individuality.

(3) The Permanent Program Reporter - This is usually a journalist attached to the program who researches and presents reports on particular items and conducts interviews in depth. [Ibid.]

From the "permanent program personality," whether in category (1), (2), or (3), supra, the Corporation expected com-

pliance with its policy statements. The concept of independence did not extend to the production staff being able to act against established Corporation procedures. The "permanent program personality" was ordered in stimulating discussion of controversial issues "to comment within reason and context," and to "refrain from expressing overt or implied judgments or conclusions on controversial matters." [Ibid.] [It should be noted that the underlined emphasis is that of the CBC, not mine.] In several different ways the CBC restated, in its policy statement, the need for impartiality, for "impeccable" research to obtain a "solid factual background," for diversity of opinion, and non-involvement on the part of the producer.

e. Open Line Programs. As a visual-audio medium television has the capacity to heighten spontaneity. The live interview covering a controversial subject possesses the quality of electricity. Strong supervision by CBC supervisors over producers, and by producers over the interviewed cuts away at that spontaneity. Such control, by definition, gives a program a planned appearance. But, it is this that the CBC must have if as a corporation it retains responsibility for fairness and impartiality. This is clearly demonstrated in the Corporation's policy statement attached as Appendix B-6-(e).

Yet, there remains a kind of irresistible force to the broadcasting, and especially, the television medium. It seeks to involve people. And the greater the involvement, the harder it is for the broadcaster, in this instance, the CBC, to maintain firm lines of control, to order discipline, without causing the program to atrophy.

This is nowhere better illustrated than the "open line" show in which the public is invited to speak their views generally and specifically on designated subjects. The rules of the CBC promulgated in 1965 are shaped to bring responsible fairness, not freedom of access

[CBC Programming: Policy and Procedures--"Open Line" Programs,

June 8, 1965 (confidential memorandum from E. S. Hallman, Vice-President, Programming):

CBC regards the use of the so-called "Open Line" programs as a valuable way to encourage the expression of individual points of view on social and political questions. It also provides an opportunity for program cooperation between the CBC and its affiliated private stations.

Safeguards are necessary to protect "open line" programs against "capture" by organized pressure groups or by irresponsible individuals. It must be remembered that the CBC is fully accountable for anything that is broadcast on its stations and networks. Editorial supervision must be effective to preserve a fair balance among different and opposing points of view, and to avoid legal difficulties.

Although it is not necessary that all speakers on "open line" programs should be identified on the air, it is necessary that the Corporation know the speakers' names and be in a position to check their bona fides. This can be done by establishing a screening system in which callers are asked to identify themselves to a producer or other responsible person before calls are put through to the on-air host.

All persons whose voices are to be broadcast should be so advised, either by the person who initially receives the call or by the on-air host when he first speaks to the caller. (This would not necessarily apply to any subsequent rebroadcast of a recorded Open Line program).

A tape delay loop should be operated in the studio to screen out undesirable comments.

Where it is desired to have the on-air host telephone to someone outside the studio to seek his participation in the broadcast, the telephone call must first be placed by someone who is not on the air at the time and the permission of the person called must be sought before he is connected with the on-air host and asked to speak. The host should then identify himself and the program on the air and advise the person called that his comments are being overheard by the broadcast audience.

Both by law and choice the CBC has taken on itself full responsibility for that which is carried over the network. It cannot, therefore, escape the heavy burden of imposing restraint so that power is not abused. The Corporation has not chosen to pass on that responsibility by encouraging its treatment as a common carrier. It has not chosen, to the extent possible within the law, to open its channels to the public and let the public, the speakers, bear the full responsibility for what is said. Rather, the view seems to be that anything broadcast over the CBC bears the imprimatur of the CBC. Thus, restraint is necessary. Hence, it may be proper to end this section with the Corporation's statement on its series "Plain Talk," a religious program. It may not be inappropriate to draw attention again, as was done at the beginning of this discussion on broadcasting, to religion. [CBC Programming: Policy and Procedures--Religious Programming--"Plain Talk" Series, July 26, 1965 (confidential memorandum from D. L. Bennett, CBC Director, Program Policy)]

Following an incident early this year at Sydney, N.S., where a speaker in the series 'Plain Talk' was judged to have overstepped the bounds of fair comment, Program Council and the National Religious Advisory Council have reviewed the editorial objectives and policy of these series.

So that local program authorities may have a policy basis for dealing with situations which may arise in connection with the Plain Talk series, Program Council has asked that the following statement by the National Religious Advisory Council be circulated:

"Plain Talk" is intended to interpret to the widest possible audience a religious message distinctive of the speaker's denomination, but also relevant to society and its needs and interests.

The subject matter is at the discretion of the speaker, consistent with the intention of the programme.

When controversial issues are discussed the CBC expects that the bounds of reason and moderation will be observed. Deliberate and unjustified criticism of religious groups and beliefs other than the speaker's own is not the intention of this programme.

The CBC programme director in each station shall determine whether a disputed broadcast is acceptable, having resort to the Supervisor of Religious Programs for advice as deemed necessary."

Program officers should also take note of the answer given by the CBC to a question in Parliament concerning the Sydney incident. The full question and answer are printed on page 386 of Hansard on April 26, 1965. The answer to question 8, which embodies a statement of the Corporation's editorial policy regarding Plain Talk, was as follows:

"These talks are intended to appeal to the widest possible audience and to avoid theological disputes which might tend to divide members of different religious faiths. No restrictions are placed on the advocacy of any particular faith or doctrine; but speakers have generally understood that criticism of faiths or doctrines differing from their own is not acceptable."

Local program officers responsible for dealing with these series are advised to draw these two statements to the attention of their local Religious Advisory Councils and to those clergy and laity who are

invited to take part in the Plain Talk series. Attention may also be drawn to the following statement originally circulated by the National Supervisor of Religious Programs, concerning the aims of Plain Talk:

"The title, 'Plain Talk,' should be an indication of the type of talk we need. It should indeed be plain talk---not sermons or inspirational messages. The talk should be topical and deal with areas of current concern."

It is not the CBC's purpose to rule religious disputation off the air. Indeed, this sometimes makes for very lively programming. However, that is not the purpose of the Plain Talk series, and it is expected that other opportunities can be provided in the schedule where considerations of balance and audience interest can be more effectively taken into account.

7. CONTROVERSIAL BROADCASTING: PRIVATE STATIONS AND THE COMMUNITY.

A broadcaster operates in a defined community which, to some extent, exerts its own restraints on freedom by imposing its own values. More than one licensee has found, including the CBC, that there may be limits to audacity in programming. This section will set forth two examples of limits imposed by private broadcasters. The first deals with the effect of an "open line" show on a community; the second, with a broadcaster's attempt to minimize controversy and the BBG's reaction.

(a) "Open-line." In 1965 opposition arose to the license renewal petition of station CJOR in Vancouver. The BBG ordered a hearing which was held in Vancouver from March 23-26, 1965. Important members of Vancouver society were provided an opportunity to air their

grievances against two of the station's programs, "Hot Line" and "Cross Fire," whose format consisted of a host talking with anonymous callers, generally about controversial subjects. On occasion there might also be in the studio or on the line an "expert" on the subject under discussion. Among those striking at CJOR, urging that the license should not be renewed because of the nature of the two programs, were the Benchers of the Law Society of British Columbia, the Greater Vancouver Ministerial Evangelical Association, and the Greater Vancouver Full Gospel Ministerial Fellowship.

To illustrate "Hot Line's" and "Cross Fire's" handling of controversial issues, some shows were taped and played at the hearing. The program topics were: retarded children; homosexuality and lesbianism; marijuana, and birth control. Often the host treated the subject personally. For example, to a woman invited to visit a retarded children's school, the host replied that he "lacks warmth" toward the retarded. [BBG Transcript of Hearing, Vancouver, CJOR 1965 (March 23-26) p. 113]

Another taped program was of a homosexual and a lesbian discussing exactly how such people interact sexually. "Sodomy," "masturbation" and other dictionary words were used in the description, not slang. [Id. at p. 118] The interviewers spoke tactfully in such discussions. The host, however, was blunt. He addressed the callers as "Lesbia" and "El Sybiedes." [Id. at pp. 118-119.]

The taped program on marijuana gave evidence of vulgarity. The host referred to a caller with whom he had a strong argument

as an "emotional ignorant broad." [Id. at p. 124] He continually cut her off; told her to "shut up." [Id. at p. 122] He set himself up as an authority on the relationship between marijuana and other drugs. (It appears that his statements were not based on any significant research).

On the controversial subject of birth control, the host began a discussion with a telephone operator who was connecting him with a priest in England. Not knowing she was on the air, she stated an intent to use birth control when married and made other statements that might not have been made if she knew she was on the air. Apparently, this type of conversation was often elicited on the shows and many secretaries who had been subjected to it had complained.

A hearing officer at the CJOR hearing said:

Subjects such as birth control, free love, premarital sex, promiscuity, and so on, in contravention of Regulations respecting Radio Broadcasting have been discussed A public radio broadcast carried on by uninformed and biased persons speaking as authorities on such matters, which cannot be withheld from children and teenage youth has, therefore, too great an influence upon young and impressionable minds to be used for such discussions." [Id. at p. 178]

It should be noted that the BBG members themselves never criticized the station for discussing birth control, etc. They only reacted to the way these topics were discussed.

The program host extended his criticism to the institutions of society. He attacked the legal profession. Indeed, such attacks were said to be common practice on these programs, according to the Law Society representative who stated:

From time to time . . . , this particular program appears to have made out a course of conduct or inaccurate innuendos involving the courts, the judiciary, and the administration of justice. [Id. at p. 158]

In a discussion of a Canadian Football League (CFL) ruling the host failed to get Mr. Sidney Halter, Commissioner of the CFL, into an argument. When the host referred to the Ontario Bill of Rights, the Commissioner, who is a lawyer, answered that the Bill did not apply to the CFL ruling. Later on the same day, the host spoke against Mr. Halter and the legal profession generally.

Halter is a lawyer. The Bill of Rights has nothing to do with it . . . What gall for a lawyer to say the Bill of Rights does not apply . . . You know what people by and large think of you [lawyers] and it is guys like Halter and a few others of you that make us think that. When I hear Halter say the Bill of Rights does not apply, I am sick and want to vomit. [Id. at pp. 146-147]

The Law Society cited still another illustration of what to it was unwarranted criticism. A caller prefabricated details of a case pending before a magistrate, naming the judicial officer specifically. To the Law Society the magistrate was defenseless:

He cannot enter into the forum of debate and it was completely erroneous, the damage is done, and no matter what he says or what other reply he makes, there will be a great number of people who listen to the broadcast who will say, "Oh yes, the magistrates, they just don't know what they're doing." Now we feel this type of thing does not do any good, it creates a very bad impression and it is unfair and improper. [Id. at p. 161]

At the hearing the BBG indicated concern for the effect of open line programs on CJOR itself. Counsel for the BBG asked whether the "sensational aspect is just a gimmick." [Id. at p. 152] But, in any event, the popularity of the open line shows had taken

their toll on more staid CJOR programs. Previously, fifty percent of station revenues were derived from religious broadcasting. By 1965 the station had no such programs, although some shows did discuss religion. [Id. at p. 107].

The minister representing the Greater Vancouver Evangelical Association summarized his organization's concern with "Hot Line." [Id. at pp. 177-180]

1. Many of the subjects, such as birth control, should not have been aired according to the regulations of Radio Broadcasting.
2. The character of "Hot Line" was "negative and destructive," particularly in "attack and smear" directed against law-enforcement officers, lawyers, doctors, teachers, morticians, ministers of religion and others." [Id. at pp. 179-180]
3. "Hot Line" agitated toward lawlessness by discussing and encouraging illegal behaviour.
4. Many of the programs were profane and obscene.
5. The practice of callers being anonymous led them to make irresponsible statements.
6. Callers were often cut off and in other ways impeded so that their freedom of speech was impaired.
7. The popularity of such programs will lead others to such "bizarre broadcasting." [Id. at p. 182]

The minister along with the Law Society agreed, however, that they would be quite happy with CJOR if the new policy established by its owner and submitted to the BBG were implemented. That policy was read at the hearing:

1. All programs shall be conducted in accordance with the letter and spirit of the Broadcasting Act, the regulations of the BBG and the Code of Ethics of the C.A.B.
2. Neither the subject matter discussed or presented for discussion nor the presentation of any subject shall be in bad taste or capable of justifiable complaint.
3. No broadcaster shall express or permit to be expressed any view which is not morally or socially responsible.
4. Controversy shall not be avoided, neither shall controversy be provoked for its own sake.
5. No interview shall be broadcast without having afforded to the interviewer the opportunity of refusing the interview and insofar as is practicable the opportunity for the rebuttal shall be afforded when the circumstances dictate.
6. Broadcasting personnel shall not comment unfairly or abusively upon the opinions of any person in communication with the station or the refusal of any person to express his opinion or make a statement.
7. The interpretation of these regulations and the application thereof to any program material or to the content of any program shall be within the sole and absolute discretion of the President of CJOR Limited. [Id. at pp. 183-184]

The BBG, however, was not so receptive. It did not believe CJOR's owner and president was able to implement the policy. The Board refused the application for license renewal. [Vancouver - CJOR, 1965, BBG Decision (March 31)]. The station was later sold. [Vancouver - CJOR, 1965, BEG Decision (Sept. 23)]. And, the Board

in Circular No. 103, issued May 27, 1964 attempted to place stations in a position of being compelled to exercise greater responsibility as to telephone calls to open line shows.

(b) Station restraint. Organized labour took the opportunity afforded by CKSO TV's application before the Board of Broadcast Governors (BBG)--for an increase in the power of its antenna and a change of its site--to complain about their inability to get time on the station. The application was approved and, as regards labour's right of access, the BBG reiterated its policy on controversial broadcasting which had been set forth in the 1961 BBG White Paper. [B.B.G. Political and Controversial Broadcasting Policies, 1961]. In its decision, the BBG did state, however, that this policy was under review, although it then rejected labour's petition and granted the station's application. [Sudbury--CKSO-TV, 1966, BBG Decision (July 11)].

That questioned was whether a broadcaster must give equal time only to a person or group who or which has been attacked in another of its programs or whether it must give equal time to anyone or any group wanting to put forth its ideas. Related to this question was another issue: Must time be given if the broadcaster feels it will not be used in the public interest? The BBG held that time must be given only if a person or group has been attacked. CKSO stated that the programs which the United Steelworkers Union had presented on its station had been too controversial and for that reason refused to renew the contract. The management feared

primarily the impact of such programs on the community. Partly, however, it was concerned that, as licensees, CKSO's owners could be criticized for not having more control of what was broadcast. The station's management felt that it was, in part, responsible for violence in recent union disputes in Sudbury because the Steelworkers' programs "preach violence and reap violence." [BBG

Transcript of Hearings, Sudbury and Elliot Lake CKSO-TV, 1966
at p. 450].

Representatives of the Steelworkers argued that they "cannot, however, accept the suggestion that the station's interpretation of what might become controversial could be this selective," [Id. at p. 423]. They pointed out that CKSO had a monopoly position. It was the only TV channel in Sudbury and Elliot Lake. It was the only station by which the union could reach their 15,000 members. [Id. at p. 413] "In communities such as these mining areas it is essential for the intelligent conduct of industrial relations that the members of our union and their families be properly informed of all issues." [Id. at p. 415].

Because of the prevalence of shiftwork in Sudbury the union membership could not be reached effectively through general meetings. To the Steelworkers then a regular weekly T.V. program was the best vehicle to keep members informed. This was in contrast to the station's policy "to refuse controversial broadcasting at all times, except at election time and during plebiscites." [Id. at p. 445]

If the unions could not use television regularly, the Steelworkers claimed that private capital, which, it believed, is necessarily aligned with employers, can decide "quelle est une mauvaise opinion," [Id. at p. 420]. Moreover, the union stated that their programs are necessary to play down the violent side of disputes which, it felt, the station newscasts accentuated.

CKSO had suggested that the Steelworkers sponsor programs and use the advertising spots for union announcements. But the union disliked the parallel with the soap sellers, "vendeurs de savons," and also felt that the time would not be sufficient. [Id. at p. 421]

The Steelworkers had similar shows on other stations elsewhere. CKSO management thought, however, their area warranted different treatment. It is a "hot community," [Id. at p. 453] Considering that, in Sudbury, the Mine, Mill and Smelter Workers represented another large segment of employees and that most citizens belong to Mine, Mill or the Steelworkers, it may be that "heat" is generated between the two.

If such strong emotions exist, one can also say that giving the unions time would let off steam. But CKSO thought the unions generated even more heat among viewers because of the "aggressiveness of this type of broadcasting," [Id. at p. 452]

A BBG member asked CKSO's President whether his policy did not set him up as "judge of what is right" and should he not have left Sudbury's problems to "the civic authorities." [Id. at p. 454]. The President answered: "We have taken the attitude

that the sin of omission is perhaps a little bit more acceptable here than the sin of commission We don't think it is responsible to allow ourselves to be put in that position." [Ibid.]

8. CONTROVERSIAL BROADCASTING: THE UNITED STATES:
"THE FAIRNESS DOCTRINE;" MEDIA OWNERSHIP: AND
ACCURACY IN BROADCASTING.

We have chosen material of the sixties, including Federal Communication Commission's (FCC) license applications, petitions, inquiries, regulations, and court decisions to summarize the FCC's Fairness Doctrine as it is now applied. We have also looked into some background issues, particularly, accuracy in broadcasting and media ownership concentration. The degree of accuracy is directly related to the need for control and for expressing all sides of a story. The degree of ownership concentration poses the threat that one point of view only will be articulated.

The FCC was established by statute in the U.S. in 1934 and is similar to the Canadian Radio and Television Commission. [Communications Act of 1934, Tit. III, c. 652, 48 Stat. 1081, as amended, 47 U.S.C. § 301 et seq.] The FCC differs, however, in that it also regulates the common carrier operations on telephone, wire and cable. In 1949, the FCC first established the doctrine which it had been developing since 1934, the Fairness Doctrine.

[Report of the Commission in the Matter of Editorialization by Broadcast Licensees, 13 F.C.C. 1246, Vol. 1, Part 3, F.R. 91-201] Ever since the government had taken the role of licensing radio stations in 1927 [Radio Act of 1927, c. 169, 34, 44 Stat. 1162, 1163.]

that is, not letting anyone broadcast who wanted.¹⁸ It had been established that the monopoly position of stations required that they operate in the public interest:

The legislative history is clear that the Congress intended that radio should be maintained as a medium of free speech for the general public rather than an outlet for the views of a few, and that the responsibility held by broadcast licensees must be exercised in a manner which would serve the community.
[Applicability of the Fairness Doctrine in the handling of Controversial Issues of Public Importance, Public Notice of July 1, 1964, 29 F.R. 10415 (1964).]

In setting out the Fairness Doctrine and in reaffirming the need for the discussion of controversial issues of public interest, in 1949, the FCC operated on the belief that:

It is the right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views in any matter, which is the foundation stone of the American system of broadcasting. [Report on Editorialization, supra, § 6.]

The fairness principle put succinctly in 1949, is:

Broadcast licensees have an affirmative duty generally to encourage and implement all sides of controversial public issues over their facilities over and beyond their obligation to make available on demand opportunities for the expression of opposing views. [Id., § 9.]

Later years were to see many cases before the FCC on:

1. Whether a station had actively "encouraged" diverse views;
2. Whether it had "implemented" their presentation by giving adequate time, etc.;

3. Whether the issue involved were, in fact, "controversial;"
4. And the whole doctrine was to be questioned on the grounds of infringing the constitutional right of broadcasters to freedom of speech.

The constitutionality of the doctrine has been upheld steadfastly by the Supreme Court, most recently in the Red Lion and RTNDA cases [Red Lion Broadcasting Co., Inc. v. F.C.C. and U.S. v. Radio Television News Directors Association (RTNDA), 89 S. Ct. 1794 (1969)] which were discussed in greater detail under topic I(A), supra.

A concomitant principle is the personal attack doctrine which is as set out in 1949: "Elementary considerations of fairness dictate that time be allocated to a person or group which has been specifically attacked over the station." [Report on Editorialization, supra, § 10.]

In the sixties, this doctrine has been expanded to require stations "to send the person or group attacked a notice of the action, a tape, transcript or accurate summary and an offer of reasonable opportunity to respond." [Codified Procedure to be Followed By Stations In Handling Personal Attacks Under Fairness Doctrine, Public Notice of July 6, 1967; 32 F.R. 10303, as amended 32 F.R. 11531 and 33 F.R. 5362.] Time limits are set for when the rebuttal may take place.

The fairness doctrine and the concomitant personal attack rule are meant to encourage rather than stifle the discussion of

issues and personalities yet ensure that many sides will be represented. Plainly in favour of the doctrine, the U.S. Congress, in 1959, specifically affirmed the Fairness Doctrine in an amendment to the Communications Act. [Communications Act, supra, s. 315]. In the decade of the sixties, the Fairness Doctrine has been clarified in various FCC inquiries and license applications and in further rulings on the doctrine.

Media Ownership

Tied to its concern for debate on issues of public interest, the FCC has studied and acted upon what it considers undue concentration of media ownership. This problem is manifold. If one management runs more than one media outlet in a single community or many in the nation, there is danger that one view or way of thinking will prevail. Even the most conscientious followers of the fairness doctrine must sometimes transgress without being aware of doing so. There are many ways of leaving a mark on a program, e.g. in editing, and in the hiring of staff. Is this a natural tendency which cannot be curbed? Should it be? Are the dangers greater than the benefits of economies of scale?

With the recent trend toward conglomerates, there is a further problem of managements using broadcasting revenue in other investments and cutting corners in operating costs thereby short-changing the public. Another danger is that in such large enterprises, management control over broadcasting may be lax or slow.

A recent attempted merger between International Telephone and Telegraph (ITT) and the American Broadcasting Corporation (ABC) was thwarted and now ABC is said to be in some financial difficulty.

The FCC's concern with ownership concentration is related mostly to the larger markets. It is recognized that in smaller communities the only way different outlets, e.g. an AM and FM station, will be on the air is if the same company runs both. Costs are otherwise prohibitive and, of course, television costs are greater than that of radio.

As of spring of 1969, the FCC was reviewing its policy on multi-media ownership which at present is as follows:

1. A party is prohibited from owning, operating, or controlling more than one station in the same broadcast service in the same area, that is, e.g. two television stations in one area. [Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, (FCC 68-554, Docket No. 18110, May 17, 1968)]
2. An interim policy (pending further inquiry and study of the results of the interim policy), to prevent one party from owning more than one broadcast outlet--AM, FM or TV--in the same area. [Notice of Proposed Rule Making (FCC 68-332, 33 F.R. 5315, April 3, 1968).]

It would be well to find out whether or how many applications the FCC has refused which concerned ownership of more than one outlet of any type in the same area. Renewal applications would not be relevant as the rules set forth in the interim policy specify that divestiture is not required. One wonders how effective the policy can be if only new applicants are proscribed.

The FCC had proposed an ironclad rule that ownership of TV stations in more than three of the top 50 markets be prohibited but has decided instead to return to its old policy whereby such an application must show that there is a "compelling public interest" for the granting of a fourth such license. [Amendment of Rules Relating to Ownership of Standard AM, FM and Television Broadcast Stations, supra, p. 6.] This rule relates to the national market and differs from the rules discussed supra which relate to local markets. That is, for example, one can hold two radio licenses for different areas. The limit to ownership concentration at the national level is "seven AM stations, seven FM stations, and seven TV stations, no more than five of which may be UHF." [Amendment of Section 73.636(a) of the Commission's Rules Relating to Multiple Ownership of Television Broadcast Stations, (FCC 68-135, Docket No. 16068, Feb. 9, 1968).] According to a dissenting opinion of Commissioner Johnson the return to a policy of requiring a "compelling public interest showing" is meaningless because the FCC has used this "to justify waiving the hearing requirement in every case brought to the Commission under the previous interim policy." [Id., Dissenting Opinion of Commissioner Johnson, p. 7]

These cases concerned the purchasing of TV stations by parties already holding three stations in the top 50 markets and so each purchase went through without a hearing.

It may be that prior to any of the multi-media ownership restrictions being made, the FCC should have made a thorough study to determine whether in fact such concentration has had detrimental results and, of course, the extent of this concentration. An inquiry is presently under way (as of Feb. 8, 1969) regarding the latter. [Inquiry into the Ownership of Broadcast Stations by Persons Or Entities With Other Business Interests, (FCC 69-117, Docket No. 18449, Feb. 8, 1969).] But, it can be asked, if the evils of concentration still are taken for granted? As put simply by one FCC Commissioner, "there is nothing necessarily virtuous in smallness nor is bigness necessarily evil." [Id., Dissenting Statement of Commissioner Robert E. Lee, p. 2.]

In addition, while many recent FCC published statements refer to concern over "concentration" and "conglomerates," there seems to be a certain reticence in bringing the three major U.S. networks to task. The managements of Columbia Broadcasting Systems (CBS), the National Broadcasting Corporation (NBC) and the American Broadcasting Corporation (ABC) have long had a wide span of control over broadcasting in the U.S.--and Canada, too, for that matter through program content. How have they fulfilled their stewardship? Would independent local stations be better? Have independent local stations been better than their major network competitors? What is "better?" Since we understand a fourth major U.S. network

may be considered desirable in the U.S., how does this fit in with the "no more than three in the top 50 markets" rule? Does the FCC consider that affiliation, not ownership, say with CBS, is a completely different issue? If so, is this logical?

Perhaps developments in cable television will make so many channels available that the FCC's regulatory work will decrease in importance. If one has a choice of say 20 stations, to watch or to buy time on, is there not the opportunity for great diversity? Moreover, since the FCC's basis for ensuring that licensees operate in the public interest is that broadcasters have a monopoly position granted to them by the government, does not a significant increase in competition change this postulate? In a country like Canada which is officially bilingual, are there not advantages to one management owning a French and an English station in the same market? Does this not foster unity? Furthermore, it would seem that needless duplication of effort is required if ownership diversification is de rigueur in such a wide-open territory as cable TV makes possible.

Accuracy

At the same time as the FCC strives for the widest possible discussion of issues of public interest, it also acts as a kind of de facto censor through imposition of certain standards on broadcasters. The FCC is a censor not as movie review board but as an administrative body which has inter alia the power to license or not license stations. Station managements are thus forced to exercise controls over programming to ensure that all FCC policy is carried out.

Naturally there is danger that controls will be over-zealous.

The FCC thus has a difficult task in encouraging wide ranging debate yet enforcing standards. For, as with the CBC and the CRTC, the goals can conflict. An example of this is when the FCC admonishes a licensee for some past programs but does not take away the license for fear of stifling free debate. In one case, the FCC found that: "the licensee had not exercised proper supervisory controls We requested that the licensee review its supervisory policies in this respect We did not place any of NBC's licenses in jeopardy and, indeed, it would have been most inappropriate to do so. For, the result of such action would be to discourage robust wide-open debate on controversial issues the message to the licensee would be to avoid controversial issue programming, because a mistake could jeopardize the broadcaster's entire existence. [Letter to the National Broadcasting Co., 14 FCC 2d 713 (1968).]

Since no penalty or hardship is imposed on the station because of its "mistake," will broadcasters ignore the FCC's admonitions? In a similar decision, which is discussed below, the case was considered important enough to merit Congressional inquiry, yet the same type of ruling was made. On the other hand, perhaps even the very holding of an inquiry and the resulting order to review its policy would make a station pause at future mention of controversial issues--particularly crimes like smoking marijuana--or the airing of a dramatization of these problems.

What then will be the result of a recent FCC inquiry into a marijuana party? In this case, WBBM-TV Chicago and its owner, CBS, were found to have not exercised proper controls in a matter of investigative journalism and were admonished to set out policy covering this, for future reference, and to investigate complaints more thoroughly. [Inquiry into WBBM-TV's broadcast on Nov. 1 and 2, 1967 of a report on a marijuana party, (FCC69-537, Docket No. 18101, May 16, 1969).]

The programs in question--which also resulted in a Congressional inquiry--were presented in two parts during newscasts on WBBM. A news reporter, Mr. J. Missett, recently graduated from Northwestern University in Chicago, suggested that the station film a pot party on that university's campus. Missett's plan was accepted and he along with seven others were filmed by the TV cameras smoking pot. Speaking during the party they argued against the harshness of the laws regarding marijuana. After the films were presented, interviews followed with informed persons.

The FCC found that Missett had "induced" the party by asking a student--called Witness A in the hearings--to gather some regular users together for a party so that WBBM might film it. While Missett and his superiors contended the party had not been "staged" for the broadcast, the FCC found that Missett's actions had led to the party and that it would not have been held but for his request. As WBBM issued a disclaimer of staging prior to the second broadcast in answer to allegations to that effect by Northwestern, the FCC found

that the show was "misleading in that the public was given the impression that WBBM-TV had been 'invited' to film a student pot gathering which was, in any event, being held, whereas, in fact, its agent had induced the holding of the party." [Id. at p. 14]

It is, of course, a crime to be in possession of marijuana, to smoke it, to buy or sell it. Thus WBBM, through Missett, has "induced" a crime, according to the FCC,

The FCC did consider the redeeming points. Smoking pot is also a very controversial issue which certainly merits close study--such as the filming of a pot party, if it is spontaneous. The FCC agreed that "in a sense, then, the party was, 'authentic'--it was not staged by 'actors' or 'non-students' who did not smoke marijuana or who were pretending to." [Id. at p. 12] Moreover, "the public obviously was aware that the party was being held with the television camera a major factor." [Ibid.]

As for Missett, he seems to agree with the FCC's findings of fact but simply did not see his actions as "inducement." He made it clear that WBBM was not going to pay the students and that it would be broadcast as a news item of an actual event. Suppose he had heard of a party to be held on a Saturday night and asked that it be changed to Friday for the convenience of the camera crew, would this be inducing the commission of a crime? That Missett should not have agreed with the interpretation of the FCC yet probably accepted its findings of fact is evident because he, on the one hand "denied that the October 22, 1967 party was arranged at his solicitation," yet also testified "that at the time he indicated his interest in filming a

marijuana party to Witness A, no party had been planned by Witness A." [Id. at p. 4]

"Witness A," referred to above, is not named because Missett had promised anonymity to those who attended the party, and WBBM and CBS supported this in their policy on non-disclosure of sources. It would seem that the FCC went along with this but, considering its concern with accuracy, we are surprised that it believed that more responsibility and accuracy would ensue if people who gave information could not remain anonymous. The FCC's acceptance of this policy was tempered, however. The Commission stated that WBBM's management should have questioned those who took part in the party. This would not, according to the FCC, have impinged upon the promise of anonymity. The station, however, argued that it accepted Missett's word that the party had not been staged and did not go further because of the anonymity promise. This reason, stated the FCC, "simply cannot be controlling in the face of the circumstances here confronting the licensee." [Id. at p. 17]

The FCC agreed that "WBBM-TV could properly present a pot party as a facet of investigative journalism." [Id. at p. 16]

Nevertheless, it was held that "the film should not have been made because the inducement of commission of the crime is involved."

[Id. at p. 14] "Simply stated the licensee has to be law-abiding."

[Ibid.] While on the face of it these distinctions are clear and have merit the effect could be debilitating on creative journalism. How, for example, under FCC policy, could one film an abortion documentary, unless inquiries were made as to who performed such

operations?

Considering the necessity of public debate in order to educate people on the important issues of the day, it must be asked whether the kind of results from this marijuana party inquiry will stimulate discussion. In a dissenting statement to this inquiry report, Commissioner Johnson spoke of the dangers of the FCC position: "Electronic newsmen, journalists, writers and cameramen . . . need the FCC's support against corporate management that is all too willing to sacrifice their First Amendment rights and responsibilities upon the alter of comfortable, complacent, non-controversial programming." [Id. Dissenting Statement of Commissioner Johnson, p. 9]

Commissioner Johnson thought the majority decision in this case is likely to result in self-censorship. He stated specifically that the decision is overbroad because of its key point that Missett, as the agent of WBBM, had "induced" the commission of a crime. This conclusion would not, in the Commissioner's opinion, be upheld in court. As in the discussion supra regarding Missett's own feeling that he had not "induced" a crime, many points can be raised in opposition. The Commissioner even encourages people to challenge the majority decision in court. Otherwise, broadcasters merely opt for the safer programming of soap operas and situation comedies. Accordingly, their credibility as advocates for the freedoms of speech and of the press is lost. [Id. at p. 30]

Another Commissioner supported the view that Missett's intervention cannot be termed as "inducement." "I think the line is drawn too closely here, so it may be difficult for newsmen to

know when their efforts cease to be permissible "arrangement" and become improper "inducement." [Id. Separate Statement of Commissioner Kenneth A. Cox, p. 1]

On the other hand, another Commissioner made a separate statement to the effect that the FCC's majority opinion was not strong enough. "I agree that it is not our purpose to discourage or inhibit legitimate investigative reporting, but I think it should be made even more clear that the licensee here, as well as other licensees, must have a specific policy for the guidance of its personnel which will make known to them that they may in no way stimulate the commission of a crime under the aegis of investigative reporting." [Id., Concurring Statement of Commissioner James J. Wadsworth, p. 1.]

II

MANAGED NEWS

A. A FACTUAL STATEMENT: THE NOERR CASE

Business is more than a financial sponsor of news or entertainment. It also is a source. Indeed, recognizing the urban environment of North American society business may be a primary source. Consider for a moment. If there is a story concerning pollution industry becomes a party to the news. If there is a documentary on highway safety the giant automobile manufacturers must be consulted before the medium can view its task as completed.

There are those who would have business respond more fully to the social environment in which it operates. Such seemed to be the thinking of the Economic Council of Canada in its Interim Report on Competition Policy (July 1969). The Council set forth its rationale in a discussion of John Kenneth Galbraith's The New Industrial State (1967):

[T]he issues raised by Galbraith are worthy of consideration in all industrialized countries. One issue suggested by the book is the general role of the corporation (particularly the large corporation) in a democratic state. What is the chief goal of large corporations? Is it still, in the final analysis, some kind of profit-maximization (perhaps on a very long-run basis); or has it, as Galbraith suggests, become something decidedly different? Is it desirable, in the interests of society as a whole, that large corporate organizations should concentrate their resources and energies primarily on the achievement of their own business goals? How far should they go into what might be described as "extracurricular activities"--assuming community leadership, setting up foundations, contributing to educational and charitable causes, and in other ways endeavouring to live up to codes of good corporate citizenship? These are not idle speculations, for, unlike most individuals, many "corporate citizens", in both their main and their subsidiary activities, determine the use of very large amounts of resources. How well these resources are used, from the point of view of the total society, is of much significance. So too, therefore, are the social responsibilities of corporations and the locus of decision-making power within them. [at pp. 17-18]

Today business may be responding to the challenge of community participation. Max Ways, a leading writer for Fortune, stated: "Modern corporations are flexible and innovative. They are accustomed to sensing and meeting and evoking the changing desires of the public. Above all, they practice the difficult art of mobilizing knowledge for action; i.e. the art of managing change." [Ways, "The Deeper Shame of the Cities", Fortune, January, 1968 at p. 131]. Mr. Ways has authority for his evaluation of "the modern corporations".

John D. Harper, President of the Aluminum Company of America, wrote the lead article, "Speaking Louder Than Words," in Dateline published in June, 1968 by the National Association of Manufacturer's Clergy-Industry Relations Department. He asked whether the businessman can "turn his back on social problems he helped create?" And he answered, "Of course not . . . Social awareness is a prime attribute of today's corporate executive; and he has ten thousand consultants throughout the land ready with advice and direction if he wavers."

Yet what will happen if business sells social goals with the same effectiveness as it markets soap? Max Ways wrote of the capacity, the unique ability of business to mobilize knowledge for action. What are some of the dynamics, one must ask, of planned change? It is one matter for a business to spend \$1.5 million in Canada to launch a toothpaste or \$800,000 to \$1 million for a breakfast cereal. But what of social goals? Is it easier or more difficult for business to engineer public policy through media manipulation?

A case in point comes from the United States. It was fully described in court opinions. [Noerr Motor Freight v. Eastern Railroad Presidents' Conference, 155 F. Supp. 768 (E.D. Pa. 1957).] The year was

1949 when the Eastern Railroad Presidents' Conference decided on campaign "of organizing private motorists and other groups to be held out to the public as completely nonrailroad inspired for the sole purpose of restricting the truckers by making their operations so expensive that they could not operate at a profit." [155 F. Supp. at 778].

To achieve this end the ERPC selected five independent public relations firms for interview. Each was skilled, said the court, in the task to be achieved. Each submitted a proposed program to put the truckers in a bad light with the public. Each stood ready, through media manipulation, to create a public groundswell for legislation hostile to the truckers. The contract was awarded to Carl Byoir and Associates, New York City. The compensation even by 1949 standards was modest compared to selling soap today. But let the court speak of Byoir [id. at 778-79]: "A presentation was made by the defendant-Byoir firm prior to the execution of the contract on August 15, 1949. Byoir's presentation laid great stress on the success of that firm in prior legislative campaigns, particularly its success before the Louisiana Legislature in reducing a tax on sulphur; in the Spring of 1938 before the New York Legislature in opposing a chain store tax; in connection with A & P activities . . . ; in 1948 before the Congress of the United States in connection with the distilling industry, and finally in connection with the manufacturers of floor and wall tile with regard to building code changes which Byoir claimed his firm had secured for that industry in some two thousand cities. After the contract was awarded a memorandum of agreement was executed providing for payment to Byoir of \$75,000 a year, plus reimbursement of each and every expense of any sort involved in the campaign. Byoir immediately organized a staff to put the program into effect and execution.

While the ultimate objective is shrewdly set forth as legislation affecting the truckers, the intermediate goals are also set forth, all designed and aimed at injury to the truckers. These objectives, including the crystallization of motorist resentment arising from commercial heavy truck operations over the roads, were designed to arouse the public generally of the need to obtain new methods of financing public highways and by methods which would not appear to emanate from railroad sources. The total objectives were ostensibly set forth in a memorandum to the Department Heads of Byoir by Reynolds Girdler, Account Executive of the ERPC Account, dated September 13, 1949, in which he paraphrased the National Transportation Policy of Congress to suit his own needs, interpreting it for the purposes of the campaign as a National Legislative Policy and that (1) airlines should be used for speed; (2) trucks for short hauls and (3) only railroads for long hauls. He pointed out that if this program could be made effective through public relations the railroads' financial troubles would be at an end. He also pointed out that "our" newspaper stories, magazine articles, pictures and radio programs will be concerned with what the national transportation policy should be, dramatizing highways and heavy trucks in the following particulars: (1) highway construction costs; (2) highway safety and the part trucks play in lack of safety on the highways; (3) highway damages by trucks; (4) state revenue and expenditures; (5) general taxation stories; all geared to reflect discredit upon the heavy truck industry and all to be done without attribution to the railroads. The magazine department of Byoir was directed to "plant" stories in magazines for later use in the campaign as authoritative sources of factual information.

"It was estimated that the cost for the first year would exceed \$350,000. Girdler's memorandum was circulated to the railroads and rather glowing commendations were received from several of the committee members involved, particularly from Walter Franklin, President of the Pennsylvania Railroad; Raymond J. Littlefield, who has been introduced above; and Walter Touhy, President of the Chesapeake and Ohio Railroad, Chairman of the Competitive Transportation Committee; as well as others."

The objectives of the plan were finalized. The court summarized them. Byoir was 1) to seek out or to establish "independent" organizations favourable to the railroads' point of view and opposed to the truckers'. 2) Through Byoir and the ostensibly independent organizations, there was to be created a hostile public using the method of "The Big Lie" (described below). 3) Through the organizations and at the instigation of Byoir, there was to be generated a demand for more tax revenues from truckers by government at all levels, particularly at the state and local level. 4) Byoir and railroad contacts were to fabricate statistical information through a recognized and supposedly impartial statistical survey corporation. (These "statistics" purported to prove that truckers, as heavy users of roads, because they were insufficiently taxed, were the recipients of enormous public subsidies.) 5) By speeches, magazines and news releases, there was to be widespread national circulation of these "statistics" via the "independent" organizations. 6) Byoir was to influence and financially assist writers with access to important magazines for the purpose of preparing articles attacking the truckers. Finally, Byoir was to present research packages, with a hostile and aroused public, to legislatures, and then to propose the type of legislation desired by the railroads as the type of legislation desired by the public.

The plan was implemented. Byoir's highly-successful magazine department would "plant" magazine articles by interesting an editor in a story, and (if the editor thought it had sufficient merit), furnishing the writer assigned to the story with the data which Byoir had compiled. Also, freelance writers would be interested in a particular story, and then paid while they researched the proposed story at Byoir's offices. Thus Byoir paid the writer during the preparation of the article (eliminating the writer's financial risk in the event that the article was rejected by the magazine) and the magazine paid him for writing it.

The first article, "The Giants Wreck Highways" with a subtitle "Heavy Trucks are Making their Runs on Your Tax Dollars" appeared in the 1950 issue of Everybody's Digest. In the same month Byoir also claimed credit for having furnished some research for an article by a U.S. Senator, entitled "What Roads are Costing Us", appearing in The American Magazine. Byoir also interested Mr. Myron Stearn, a well known independent freelance writer, furnishing him with all the Byoir data. The completed product appeared in the September 1950 issue of Harper's Magazine under the caption, "Our Roads are Going to Pot". At approximately the same time another article entitled "The Rape of Our Roads" by Fredrick Brownell, a Byoir protege, appeared in Readers Digest. These two articles became the first authoritative sources of so-called independent public attacks upon the trucking industry. Further articles appeared in the Saturday Evening Post, the National Grange Monthly, Parade Magazine, People Magazine, the Country Gentlemen, etc. The final article which appeared shortly before the institution of the lawsuit was entitled "Who Shall Pay for our Roads" by the Honourable Richard L. Neuberger, United States Senator from the State of Oregon. Hearing that Harper's Magazine had discussed an article with him, Byoir offered to send the Senator some material which might be useful to

him in his article. The Byoir material was mailed to the Senator, and that he availed himself of the material was clear from the reading of the article. The Court found that Byoir had been pyramiding data, mostly "planted" material, for approximately three years, and this was the "authoritative" material submitted to Mr. Neuberger. Although Byoir, of course, did not review or edit the article, the impact of its "help" was clearly discernible throughout.

Similar inroads were made into the television medium by means of a "front" created by Byoir, called the Farm Roads Foundation which produced a \$150,000 film of which 186 colour prints were distributed for showing in movie theatres, and 10 black-and-white prints were made for showing on TV. No suggestion either in the title, dialogue or screen credits indicated the connection of the railroads with this film. The Court found that this film was viewed by millions, the effect being to prejudice the public mind against the trucking industry.

Finally, the campaign carried by Byoir was particularly successful in the state of Pennsylvania. That state had one of the lowest gross road limits for heavy trucks in the East, at 50,000 pounds, preventing the trucking industry from getting a large share of the very profitable steel-hauling business. The truckers undertook an expensive campaign of television and radio programs, to lay the groundwork for legislation to increase the maximum from 50 to 60,000 pounds. They lobbied, financed special promotional trucking sections in all the important newspapers, and even submitted \$200,000 to the election campaign of the Republican candidate for Governor, who was elected. When Byoir was hired, it began to generate publicity against the bill, persuading a long list of organizations and individuals to oppose it publicly. Although the bill was

finally passed, it was only after a violent legislative fight, and even then the clamour against it continued. For the railroads a break came when the Governor announced that he would have to hold a public hearing. The Byoir group obtained 21 witnesses for 21 organizations opposing the bill at the hearing, preparing their statements and publicity. The public hearing was one of the biggest news events in Pennsylvania, occupying front page news in every major newspaper in the state. Six minutes before the bill automatically would have become law, the Governor (who had been helped to election by \$200,000 worth of truckers' money) vetoed the legislation. As a result, some five million dollars worth of freight was retained on the Pennsylvania Railroad because the trucking limit was not raised. This was the successful culmination of the "Big Lie" technique.

Although the total annual national cost of the campaign exceeded \$350,000, the economic benefits to the railroads, of the legislation obtained clearly made it a worthwhile investment for them.

Nor were the truckers entirely passive throughout. While their campaign was not designed to drive the Pennsylvania Railroad from the transportation field, the truckers wrote to and made personal contact with legislators in support of bills increasing the weight limit on trucks. They had representatives of other industries write and make personal contact with legislators, without disclosing trucker connections. They solicited from legislators statements in support of their position, and had news releases issued thereon. The Court found that in every way possible, the truckers tried to eliminate the opposition to its legislative program in Pennsylvania.

The truckers were certain that the undercover activities of the previous years had been railroad inspired, and accordingly hired another

public relations firm to track the Railroads' activities. The ultimate objective was to obtain sufficient proof to institute a lawsuit.

B. LEGAL CONTEXT OF NOERR

Noerr arose in the context of an alleged antitrust violation under the Sherman Act. The thrust of the complaint was that the railroads combined together and through a third party sought the enactment and enforcement of laws hostile to the truckers. This, the High Court held, reversing the district court, was not enough to support a Sherman Act complaint of a conspiracy in restraint of trade. It was not enough for two reasons, both related.

(1) The Court was not about to give the Sherman Act a broad reading in the light of the facts which touched so closely the Constitutionally protected right to petition government, and, of course, the right of free speech. The Court made its position plain: "[T]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an attempt to invade these freedoms."

(2) In such a setting the Court held that the conspiracy found was not the type ordinarily covered by the Sherman Act. A line seemed to be drawn between those offenses which directly touch upon trade and commerce, and those where the action has only an indirect effect. Thus, the Court stated, conspiracies or combinations "are ordinarily characterized by an expressed or implied agreement or understanding that the participants will jointly give up their trade freedom or help one another to take

away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market division agreements, and other similar arrangements." The activity in question was political, not business.

The Court affirmed its Noerr position in United Mine Workers v. Pennington, 381 U.S. 657 (1965). At issue, inter alia, were two questions raised by small coal operators who charged they were injured as a result of a combination between large coals producers and the UMW:

(1) Was it unlawful for there to be concerted action to have the Walsh-Healey Public Contracts Act prevailing wage rates set so high to destroy small coal operators acting under the statute?

(2) Was it unlawful for there to be concerted action designed to induce the TVA to buy only from those coal operators conforming to Walsh-Healey?

On both points the Court left no room for doubt. "[S]uch conduct is not illegal, either standing alone or as part of a broader scheme itself itself violative of the Sherman Act." The Noerr case stands as firm law. But, the case does have certain boundaries which have meaning in terms of managed news.

Take these fact situations as illustrative: Suppose a group of competitors holding a strong industry position go to the Patent Office with what they term an invention. Through collusion they fail to disclose that their invention is really part of the prior art. Have they entered a conspiracy in restraint of trade? The U.S. Supreme Court so held. [See, United States v. Singer Mfg. Co., 374 U.S. 174 (1963).] Suppose now that a corporation under cloak of a foreign government's protection excludes another from the market. The Court has ruled that Noerr may not be interposed as a defense. [See, Continental Cre Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962)].

Depending on how the news is managed as well as its purpose U.S.

antitrust law has come into play. Indeed, for that matter even the antideceptive provision of the Federal Trade Commission Act has been used to regulate the deceptive management of news by business where the effect might be to mislead consumers. [See, Baum, Truthful Disparagement Under The Federal Trade Commission Act, 51 The Trademark Reporter 1081 (1961)]. For that matter legislatures in the enactment of specific legislation not only have restrained news from being disseminated, but also as a condition to its release have compelled disclosure of enumerated material. The obvious example of this kind of law relates to the securities market. In terms of new issues or new developments, depending on the circumstances, companies may be forbidden to speak or required to make any statement one of fact. Consider The Corporate Guide To The Timely Disclosure Policy of The Toronto Stock Exchange. (September 30, 1968):

The Timely Disclosure Policy of the Exchange requires a company listed on the Exchange and the management of such company to disclose promptly a change in the affairs of the company which might reasonably be expected to affect materially the value of the listed securities.

• • •

The announcement should be made in a manner which provides for wide dissemination of the news. The recommended procedure is that the announcement be made to those services which disseminate financial news over a broad area and in the main population centres. The Exchange should be advised of the announcement and supplied with a copy forthwith upon its release.

Releases when made should be factual and balanced, neither over-emphasizing favorable news nor under-emphasizing unfavorable news. It is appreciated that releases under this policy may not be able to contain all the detail that would be included in a prospectus or similar document. Releases should however contain sufficient detail to indicate the nature of the change and to enable investors to formulate investment decisions. The company should be prepared to supply further information when the occasion calls for it.

A few months before the Toronto Stock Exchange announced its new policy the New York Stock Exchange put forth even more sweeping regulations. [See, N.Y.S.E. Company Manual, "Timely Disclosure", A-18, July 18, 1968]. Once material developments go beyond "a small group of the top management" the N.Y.S.E. states that "experience has shown that maintaining security at this point is virtually impossible. Accordingly, fairness requires that the company make an immediate public announcement as soon as confidential disclosures relating to such important matters are made to 'outsiders' [id. those outside the 'small group of the top management']. . . . The extent of the disclosures will depend upon the stage of discussion, studies, or negotiations. So far as possible, public statements should be definite as to price, rates, timing and/or any pertinent information necessary to permit a reasonable evaluation of the matter. As a minimum, they should include those disclosures made to 'outsiders'. Where an initial announcement cannot be specific or complete, it will need to be supplemented from time to time as more definitive or different terms are discussed or determined."

The purpose of the Exchanges' rules, carrying in essence the imprimatur of government, is the protection of the public, of existing shareholders who might lose either through no information or misinformation. There is no question that free speech is curtailed by such rules. Nor can the legal restraints be argued away in terms of the commercial nature of the transaction, after all, a merger discussion between corporate giants could have a very real effect not only on the local community but the province or even the nation itself.

What the law controls is the principal, the corporation. It does not as such directly act on the media. It does not forbid a newspaper

from publishing a story of a rumored ore find by Company X. It does place an affirmative obligation on Company X to deny, or to announce the find, setting forth the material facts once the information has passed beyond the "small group of top management".

Key to much of the securities legislation both in Canada and the United States is disclosure. So it was that the Kimber Committee, whose 1965 report to the Attorney General led to the 1966 Securities Act of Ontario, cited with approval the approach taken by the United States Securities and Exchange Commission concerning the important prospectus: "The purpose of the prospectus is to inform investors. Hence, the information set forth on the prospectus should be presented in clear, concise, and understandable fashion. Avoid unnecessary and irrelevant repetition or the use of unnecessary technical language . . ." [Report of the Attorney General's Committee on Securities Legislation in Ontario, March 11, 1965 at P. 40.] In the legislation that followed the report both the preliminary prospectus and the prospectus, necessary instruments to the public sale of securities in the province, were to provide "full, true and plain disclosure of all material facts relating to the issue to be sold." [Statutes of Ontario, Securities Act, 1966, c. 142, Section 41(1).]

Securities laws, like those relating to deceptive practices, have been framed to restrain the exercise of speech by principals, and to establish the conditions for disclosure. The rather narrow point in Noerr, to summarize, is that antitrust law serves as an improper device to inhibit collective political activity. There are special statutes that have been drafted and interpreted controlling the machinations of lobbyists. The precise holding of the United States Supreme Court on this issue in Noerr is worth stating [365 U.S. at 140-41]:

The second factor relied upon by the courts below to justify the application of the Sherman Act to the railroads' publicity campaign was the use in the campaign of the so-called third-party technique. The theory under which this factor was related to the proscriptions of the Sherman Act, though not entirely clear from any of the opinions below, was apparently that it involved unethical business conduct on the part of the railroads. As pointed out above, the third-party technique, which was aptly characterized by the District Court as involving "deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information," depends upon giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups. We can certainly agree with the courts below that this technique, though in widespread use among practitioners of the art of public relations, is one which falls far short of the ethical standards generally approved in this country. It does not follow, however, that the use of the technique in a publicity campaign designed to influence governmental action constitutes a violation of the Sherman Act. Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

III

SALE OF NEWSPAPER CONTROL: A CASE IN POINT

This portion of the memorandum is intended to deal with a narrow fact situation. Many newspapers are public corporations in which control resides in the hands of a few. The rationale for going public might have been quite diverse. But certainly one result of the venture was obtaining additional capital without the insiders losing apparent control. Yet, what happens when the newspaper fails? What happens to the journalists? What security do they have? They, after all, live on fixed incomes. And, should security be lacking, should life not be supportable, are qualified persons apt to be attracted to the newspaper profession?

In England one principal insider of two failing, but well-known newspapers, the News Chronicle, a national daily, and the Star, a London evening paper, squarely faced the problems stated. The papers, after years of existence, were no longer able to continue. They were owned by the Daily News, Ltd., and constituted the bulk of that enterprise's assets. The Daily News, a limited company, was controlled by the family of Lawrence John Cadbury. For slightly less than £2 million the News Chronicle and the Star were sold to Associated Newspapers under the control of Lord Rothermere.

Mr. Cadbury, for his part, made a decision as to how £1.11 million of the sales price -- that remaining after creditors were paid -- was to be dispensed. It should go to the papers' employees. His goals were quite clear. He, and his fellow board members, wanted "to preserve so far as they could the employment of the members of the staff of the newspapers and, so far as that was not possible, to give them generous compensation."

The result of what the court termed his "entirely creditable motives", of course, was to deny the stockholders the opportunity to share in the sale price. Needless to say, Mr. Cadbury and his family suffered more than any other. From one of the minority stockholders there arose a suit for injunctive relief. The legal claim was quite simple: The company, even with the consent of a majority of the stockholders, could not dispense the \$1.11 million to the employees. It was an ultra vires action. The contemplated payments would be gratuitous. They would only be justified if "they are reasonably incidental to the carrying on of the company's business and if they are calculated to benefit and to promote the prosperity of the company," [Hall Parke v. Daily News, Ltd. et al. (1961) 1 All E.R. 695, 698 (Chancery Division)].

The court agreed. There was no legal obligation to pay employees compensation for loss of pension rights. The formula devised by Mr. Cadbury of one week's pay for each year of service was purely a gratuity. The expenditure would do nothing to increase the papers' profits. Citing other authority the court stated: "[A] gratuitous payment as such cannot be made. The test must be what is reasonably incidental and within the reasonable scope of carrying on the business of the company . . . [C]harity may sit at the board for that purpose, for the purpose of promoting the company's interest, but not for any other purpose." [id. at 699.]

Unlike judicial decisions from the United States, the English decision would be persuasive to a common law court in Canada. The principle of corporate responsibility to the shareholders is sound precedent. It remains to be seen whether public law should be enacted that modifies that principle in the newspaper industry. It would not be difficult for a legislature to require the formula proposed by Mr. Cadbury -- one week's

compensation for every year worked to be paid those employees of a paper being sold. It would not be difficult to place such claims, as a matter of statutory law, in a preferred position over other creditors. The result, at the very least, would bring to newspapermen a measure of job security.

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